Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	))))	MB Docket No. 02-277 MM Docket No. 01-235
	)	
Cross-Ownership of Broadcast Stations and Newspapers	))	MM Docket No. 01-317
	)	
Rule and Policies Concerning Multiple Ownership Of Radio Broadcast Stations in Local Markets	))	MM Docket No. 00-244
	)	
Definition of Radio Markets	)	

COMMENTS OF THE OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST, BLACK CITIZENS FOR A FAIR MEDIA, CIVIL RIGHTS FORUM, PHILADELPHIA LESBIAN AND GAY TASK FORCE, AND WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS

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SUMMARY

The Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press urge that the Commission generally retain, with some modification, the existing media ownership limits because they continue to be necessary in the public interest.

Ownership rules serve the public interest in several important ways. First, ownership rules promote the public's paramount First Amendment interest in a having a robust marketplace of ideas. Second, the rules foster competition in the provision of news and informational programming. Because owners' editorial choices are often affected by their economic and political interests, having diverse owners is particularly important. Third, having multiple competing outlets in local communities increases the likelihood that important local issues will be addressed and provides more opportunities for local self-expression. Finally, limiting the number of stations that can be commonly owned provides greater opportunities for minorities, women, and small businesses to own broadcast stations.

In evaluating whether the ownership rules are still necessary, as required by section 202(h) of the Telecommunications Act, the Commission should apply its usual public interest analysis. Even if the rules are not found indispensable, they continue serve the public interest and should be retained.

Neither changes in the media market nor the proliferation of media outlets warrants elimination or substantial relaxation of the broadcast ownership limits. While members of the public still rely primarily on local television stations for news and information about their communities, the amount and diversity of news and public affairs programming on television

stations has been decreasing. Other media outlets such as cable, DBS and the Internet provide little additional diverse or local content to the public. Moreover, the consolidation that has already occurred in the radio and television industries due to prior rule changes and the consequent reduction in local news programming and viewpoint diversity show that any further consolidation would be detrimental to the public interest.

UCC *et al.* therefore generally urge the Commission to retain the existing ownership limits. Retaining the current television duopoly rule is particularly important to preserve local viewpoint diversity. The Commission now has the record to justify the eight-voices test which counts only independently owned and operated local television stations in response to the court remand in the *Sinclair* case. The Commission should also retain the current definition of voices for the radio-television cross-ownership rule since no other outlets provide comparable, competing sources of news and local programming.

The Commission should also retain the national television audience reach limits because repeal would allow the four major networks to buy most of their affiliates, thus permitting a few companies to exercise dominant control over the viewpoints presented to the public. The Commission's 1984 finding that national limits did not affect local viewpoint diversity were overridden by Congress, and in any case, were based on premises that are no longer valid today. But while national audience reach limits are still necessary to promote the Commission's goals, the "UHF discount," which allows some group owners to greatly exceed the 35% audience cap, is no longer necessary in the public interest because the difference in the technical ability of VHF and UHF stations to reach audiences has been largely eliminated. The Commission should also retain the dual network rules to ensure competition in the gathering and reporting of national and international news, particularly as local outlets are increasingly insufficient.

Finally, not only are local and national ownership limits necessary in the public interest, but they promote the First Amendment interests of the public without violating the First Amendment rights of any party.

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COMMENTS OF OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST, *ET AL.*

The Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press ("UCC *et al.*"), by their attorneys, the Institute for Public Representation, respectfully submit comments in response to the *Notice of Proposed Rulemaking* ("*NPRM*") of the Federal Communications Commission ("Commission") in the above-referenced proceeding concerning broadcast ownership rules.

I. THE PUBLIC INTEREST REQUIRES THAT OWNERSHIP RULES PROMOTE DIVERSITY, COMPETITION, LOCALISM AND OPPORTUNITIES FOR MINORITIES, WOMEN AND SMALL BUSINESSES TO OWN BROADCAST STATIONS

Section 202(h) provides that the Commission shall review its ownership rules on a biennial basis and "shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."[1] While UCC *et al.* generally agree with the NPRM that ownership rules further the important public interest goals of diversity, competition,[2] and localism, ownership limits also advance the public interest goal of providing minorities, women and small businesses with opportunities to own broadcast stations.

A. The Public Interest Requires that the Commission Protect the Public's First Amendment Right to Viewpoint Diversity

UCC *et al.* agree that viewpoint diversity has been, and should continue to be, "a central policy objective" of the ownership rules,[3] and that "airing of news and public affairs programming has traditionally been the focus of viewpoint diversity."[4] While other types of programming contribute to viewpoint diversity, news and public affairs programming are critical to an informed electorate necessary in a democratic society. The public must have access to local and regional as well as national and international news. Additionally, competition in newsgathering and reporting are necessary to ensure broader coverage of issues as well as a diversity of viewpoints.

The foundation for a diversity of viewpoints, the First Amendment, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

[2] 2002 Biennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, MM Dkt. No. 02-277 ¶ 29 (Sep. 23, 2002) ("NPRM"). While competition is clearly an important public interest goal, these comments discuss competition primarily in the context of competition in the provision of news and other informational programming to viewers rather than competition in the sale of advertising. Due to the limited amount of time for comment on voluminous materials and studies, as well as their lack of resources to hire economists and purchase proprietary data, UCC *et al.* are unable to address many of the question posed in the NPRM including those regarding competition, and have focused these comments on issues of most direct concern to viewers and listeners, that is, promoting diversity and localism.

[3] NPRM at ¶ 41.

[4] *Id.* at ¶ 40.

sources is essential to the welfare of the people."[5] As the Supreme Court held in *Red Lion*, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[6]

Moreover, "[t]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of viewers and listeners, not the right of broadcasters, which is paramount*."[7] The public's right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences ... may not constitutionally be abridged either by Congress or the FCC."[8] Thus, the ownership rules should preserve "an uninhibited marketplace of ideas,"[9] and protect the public's paramount First Amendment right to have their viewpoints presented and to have access to different types of programming.

B. Competition between Different Owners is Essential to Diversity of Viewpoints

Ample evidence supports the Commission's traditional view "that multiple owners are more likely to provide 'divergent viewpoints on controversial issues,' which the Commission has stated is 'essential to democracy.'"[10] Recently in reviewing the television duopoly rule, the D.C. Circuit specifically found that the Commission had supported its conclusion that greater diversity of ownership would result in greater diversity of viewpoint.[11] Media owners have ultimate

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[5] *Associated Press v. U. S.*, 326 U.S. 1, 20 (1944).
[6] *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969).
[7] *Id.* (citations omitted, emphasis added); s*ee also Turner Broad. Sys., Inc. v. FCC ("Turner I")*, 512 U.S. 622, 663 (1994) ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.").
[8] *Red Lion*, 395 U.S. at 390.
[9] *Id.*
[10] NPRM at ¶ 44 (citations omitted).
[11] *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 16618 (D.C. Cir. Aug. 12, 2002).

control over programming content, who is hired to make programming decisions, what news stories are covered, and how those stories are covered. As demonstrated below, these decisions are influenced by the economic and political interests of the owners. Because different owners have different economic and political interests, diversifying ownership is necessary so that the public will have access to programming on different issues as well as to a diversity of viewpoints on the same issues.[12]

1. Programming is Influenced by Owners' Economic Interests

Despite the widely-accepted belief that news should be fair and unbiased, studies show that news organizations' economic interests affect their decisions about which stories to present and how to present them to the public.

About one-quarter of journalists have purposely avoided newsworthy stories and nearly as many have softened the tone of stories to benefit the interests of their news organizations, according to a recent survey that included television journalists and executives at all four major networks.[13] The survey found widespread concern among journalists in national news organizations that good stories were frequently not being pursued because of commercial and competitive pressures. More than one-third of the respondents said that news that hurt the financial interests of the news organization often or sometimes went unreported while 29% said that news that adversely affected advertisers often or sometimes went unreported.[14]

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[12] Additional examples of how ownership influences program choices can be found in Comments of CME *et al.*, 1998 Biennial Review, MM Docket No. 98-35, at 4-7 (filed July 21, 1998).
[13] Pew Research Center for the People & the Press, *Self Censorship: How Often and Why*, Survey Reports, rel. Apr. 30, 2000, *available at* people-press.org/reports/display.php3?ReportID=39.
[14] *Id.*

Similarly, a recent study of national television newscasts found evidence of promotional bias.[15] The study analyzed ABC World News Tonight, the CBS Evening News, NBC Nightly News, and CNN Headline News to ascertain whether products of each outlet's respective parent company received favorable news coverage, a practice termed "synergy bias."[16] The study found that "in the aggregate, outlets included more references to their own products and services and treat[ed] those items more favorably than others."[17] The study also noted a positive correlation between a corporation's size and the tendency for the outlet to publicize the corporation's products in newscasts.[18]

The study found that story topics coincided with corporate interests in some cases. For example, NBC, the media conglomerate with the most invested in Internet interests, covered Internet-related topics twice as often as the next highest network. Similarly, the only two networks with movie holdings were the sole ones with news stories about movies.[19]

More importantly, corporate holdings appear to influence editorial decisions regarding newsworthiness. For example, ABC and CNN covered the Microsoft antitrust suit, including an incident embarrassing to Microsoft, while NBC (which owns MSNBC) did not.[20] Similarly, an accident at Disneyland was covered by CNN, but not by Disney-owned ABC.[21] In addition,

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[15] Dmitri Williams, *Synergy Bias: Conglomerates and Promotion In The News*, 46 J. of Broadcasting & Electronic Media 453 (Sep. 1, 2002) ("Williams").
[16] *Id.* at 456, 458.
[17] *Id.* at 466.
[18] *Id.* at 466. The study found that "the most integrated firms, Time Warner and Disney, exhibit[ed] more tone bias on behalf of their products and services." Thus, CBS, the smallest of the four conglomerates at the time of the study, exhibited the least synergy bias. *Id.*
[19] For example, in a story on ballroom dancing, ABC Nightly News mentioned the film "Shall We Dance," made by a Disney-owned production company. *Id*. at 467.
[20] *Id.* at 467-68.
[21] *Id*. ABC/Disney often favors its corporate economic interests. *See, e.g.*, Chuck Phillips, *Critics Call Singer's Ties to Disney Too Cozy*, L.A. Times, November 10, 2002 (Disney-owned radio stations accused of playing an artist, associated with a subsidiary of Disney, to the exclusion of others); Leslie Kaufman, *The Sock Puppet that Roared: Internet Synergy or a Conflict of Interest,* L.A. Times, Mar 27, 2000, at C1 (noting extensive coverage given to parent company Disney World's 25th anniversary); Robert McChesney, *The Cost of Commercialization,* excerpt from Rich Media, Poor Democracy republished in The Quill, Apr. 1, 2000, at 9 (noting that Disney-owned ABC

NBC was found to have selectively reported on a few "widely held stocks" that included its parent General Electric and its corporate partner Microsoft, but only when the stocks were rising and not falling.[22]

Corporate editorial bias is not limited to broadcast and cable news outlets. An analysis of newspaper stories about the 1996 Telecommunications Act determined that newspapers' financial interests affected their coverage. The study examined newspaper stories about how the Act would change the national television ownership rule, paying particular attention to positive and negative views expressed about those changes.[23] Stories gathered from 27 newspapers indicated a strong correlation between the financial interest of a newspaper's parent company in the relaxation of the rule and the viewpoint expressed by that newspaper in its "straight [news] reporting."[24] Specifically, no newspaper with a "substantial"[25] interest in the elimination of the national television ownership rule mentioned certain downsides of industry consolidation over the course of an entire year.[26] While newspapers without a television station ownership interest expressed at least one negative consequence of relaxing the rule in 58% of their stories, those newspapers with substantial television interests included negative views in only 15% of their coverage.[27]

News rejected a report by its leading investigative correspondent exposing labor and safety practices at Disney World in Florida).

[22] Williams at 462. As large conglomerates acquire and trade more holdings, viewers are unable to effectively learn about and keep track of a company's other holdings. For example, General Electric, owner of NBC, holds an enormous variety of interests including holdings in the plastics industry, aerospace, medical equipment and an array of financial and insurance services. *Who Owns What*, Columbia Journalism Rev., *available at* www.cjr.org/owners/index.asp. As a result, in today's marketplace, viewers are not able to make their own judgments about the validity of the news and viewpoints they receive.

[23] Martin Gilens & Craig Hertzman, *Corporate Ownership and News Bias: Newspaper Coverage of the 1996 Telecommunications Act*, 62 J. of Politics 369, 374-377 (2000) ("Gilens & Hertzman Study").

[24] *Id.* at 381, 383.

[25] Newspapers whose parent company owned nine or more television stations were considered to have "substantial" television holdings. *Id.* at 377.

[26] *Id.* at 379.

[27] *Id.* at 380.

Recent events also illustrate how the financial interests of media outlets can influence reporting. Orville Schell, Dean of the Graduate School of Journalism at UC Berkeley, has attributed the media's failure to uncover the problems at Enron, WorldCom and other corporations in part to the fact that "media companies become so wrapped up in cross-ownership that they become part of the speculative go-go boom that they were supposed to cover."[28] For instance, had AOL and the *Washington Post* had common ownership, the *Post* may never have reported AOL's improper accounting practices, which ultimately ignited an SEC investigation of AOL.[29]

2. Programming is Influenced by Owners' Political Interests

In addition to economic interests, political interests can affect programming. The drafters of the Communications Act foresaw the potential for broadcast station owners to improperly influence the democratic process by affording access only to a favored candidate,[30] and thus provided for equal opportunities for political candidates.[31] However, this important provision, standing alone, is not enough to ensure that the public has an opportunity to learn about candidates running for office in their communities.[32] Maintenance of multiple media outlet

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[28] Orville Schell, *How Big Media Missed the Big Story*, Newsweek Web, July 18, 2002, *available at* *www.msnbc.com/news/783126*.asp?cp1=1 (noting that media companies failed to watchdog the finance industry as media conglomerates were involved in the very same "orgy" of mergers and acquisitions during the late '90s). *See also* Miles Maguire, *Business As Usual*, Am. Journalism Rev., Oct. 2002, at 18 ("Business as Usual") (noting how media companies downplay or ignore their own questionable corporate activities).

[29] Alicia Mundy, *Media Under Review*, Cable World (Sep. 16, 2002).

[30] *See CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 104-09 (1973).

[31] 47 U.S.C. § 315.

[32] Equal opportunities apply only to limited periods prior to elections and only after offering the opposing candidate the opportunity of appear. Thus, for example, if one candidate buys time, the opposing candidate has the opportunity to also buy time, but may not be able to afford the time. Moreover, news programs are exempt from the equal opportunity requirement. FCC Media Bureau, *The Public and Broadcasting*, (June 1999), *available at* www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html#POLITICALBC (explaining that a candidate's appearance on a newscast is not a "use" that is covered by this rule).

owners is crucial to the public's opportunity to receive a variety of political and other viewpoints.

Broadcasters often support political candidates, and such support may influence their election coverage. For example, Democrats in Maryland have accused Sinclair's Baltimore television station of bias against the Democratic candidate for governor after learning that Sinclair had provided the Republican candidate use of its corporate helicopter. A Sinclair spokesperson acknowledged that the station had been critical of Townsend in editorials but denied bias in reporting.[33] Similarly, in the 2000 Presidential election, G.E. Chairman and Chief Executive Jack Welch was alleged to have interfered with NBC's election night coverage to favor Republican George W. Bush.[34] When asked in a House hearing whether Welch told NBC journalists to call the race for Bush in the late hours of election night, NBC denied the allegation but acknowledged that the G.E. chief executive was invited to observe the journalists in the control room while attending a network party in the same building.[35]

Certain media companies also have well known political leanings that can affect their programming. For example, the Fox Television Network and its affiliated FoxNews Network has been alleged to pose "softball" questions to administration officials.[36] Moreover, the *New York Times* recently reported that Roger Ailes, Chairman of the Fox News Channel, gave President Bush a memorandum containing strategic, political recommendations following the September 11th attacks.[37] Having a senior official from a national news conglomerate attempting to influence national policy in this way raises doubts about the ability of that news

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[33] *The Ehrlich Bird Catches the Flak*, Broadcasting & Cable, Nov. 25, 2002, at 12; Jo Becker, *Ehrlich Tried to Aid Broadcast Firm*, Wash. Post, Nov. 27, 2002, at A1.
[34] Katherine Reynolds Lewis, *NBC Likely to Withstand Congressman's Inquiry On Election Tapes*, Bloomberg News, Sep. 1, 2001; Barbara E. Martinez, *Names & Faces,* Wash. Post, Aug. 29, 2001, at C3.
[35] *Id.*
[36] Daphne Eviatar, *Murdoch's Fox News: They Distort They Decide*, The Nation, March. 12, 2001, at 11.
[37] Bill Carter & Jim Rutenberg, *Fox News Head Sent a Policy Note to Bush*, L.A. Times, Nov. 19, 2002, at A24.

organization to report viewpoints objectively. Although the extent of biased reporting cannot be accurately measured, because bias is likely to occur, the FCC can and should act to ensure that the public has access to as many competing, diverse sources of news as possible.

Finally, media owners also use their media outlets to advance a self-serving legislative agenda.[38] For example, broadcasters ran an advertising campaign to build public opinion against legislation designed to institute charges for use of the broadcast spectrum.[39] A study of newspaper editorials found that every one of the newspapers whose owners had substantial revenue from television broadcasting ran editorials supporting broadcasters' free use of the spectrum for digital television while newspapers owned by companies with little or no investment editorialized against the "spectrum giveaway." [40]

In sum, owners ultimately determine what issues are discussed, what is considered newsworthy, and what viewpoints are presented to the public, and these decisions are inevitably influenced by the owners' economic interests and political leanings. Thus, the public must have access to media outlets owned by different owners to ensure that a broader range of issues are covered and a greater variety of viewpoints can be expressed and discussed as is necessary in a democracy.

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[38] Neil Hickey, *What's at Stake in the Spectrum War?; Only Billions of Dollars and the Future of Television*, Columbia Journalism R, July/Aug. 1996, at 39.
[39] *Id.*
[40] Gilens & Hertzman Study at 371 (quoting James Snider & Benjamin Page, Does Media Ownership Affect Media Stands?: The Case of the Telecommunications Act of 1996, prepared for the annual meetings of the Midwest Political Science Association, Chicago, Ill., Apr. 10-11, 1997).

3. The Pritchard Study Does Not Prove that Media Owners Exercise No Influence Over Viewpoints That are Presented

Some may argue the Commission-commissioned study by David Pritchard[41] suggests that media owners do not influence the selection or "slant" of content presented by the media. However, the study does not support such a claim.

On its face, the Pritchard study seeks to address only a very narrow question: "whether information and opinion about the 2000 presidential campaign in cross-owned media had a coordinated or consistent slant in favor of one major-party candidate or the other, and if so, did the slant reflect the interest of the media corporation that owned the newspaper-broadcast combination?"[42] Upon analyzing the news coverage of 10 cross-owned newspaper-television combinations during the last two weeks of the 2000 presidential campaign, the study found that the overall slant of the television station was noticeably different from that of the newspaper in five cases. But, no significant difference was apparent in the other five cases. From this, the author concludes that "[d]ifferent news organizations owned by the same company tended to do things differently, sometimes favoring Bush, sometimes favoring Gore, and often favoring neither."[43]

However, Pritchard's conclusion is not supported by the study. The study results actually suggest a strong relationship between viewpoint expression and outlet ownership since half of the newspaper/television combinations examined showed a correlation in viewpoints expressed. Pritchard even admits that the "data did not enable us to ascertain why both commonly owned news organizations in these five combinations might have taken a similar slant on the

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[41] David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign* (Sep. 2002) ("Pritchard Study").
[42] *Id*. at Executive Summary.
[43] *Id.* at 12.

campaign," and that "[o]ne possibility is that an unseen hand of ownership control operated to harmonize the coverage."[44]

Moreover, the study design is questionable. For example, the definition of "slant" employed by the graduate student coders is very subjective.[45] And, the study fails to clearly explain how the coders arrives at the "slant co-efficients."[46] Additionally, the material analyzed with regard to the newspapers was not comparable to that analyzed for the television stations. The study coded "all available non-advertising content about the presidential campaign in the newspapers and late-evening local newscasts,"[47] including "editorial cartoons, staff-written opinion columns other than editorials, syndicated opinion columns, guest opinion essays, letters submitted by readers, and free-standing photographs."[48] Presumably, some of these items only appeared in newspapers, which have a rich history of expressing opinions that are very "slanted" within the context of their editorial page.[49] Television news, however, does not have a corollary to an editorial page. The study's failure to control for this structural difference means newspaper/television combinations that apparently express different viewpoints may be more similar than they first appear.

The circumstances under which the study was conducted also undercut its credibility. Pritchard discloses that he previously published a study examining newspaper-broadcast combinations in Chicago, Dallas, and Milwaukee and that the Commission asked him to conduct

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[44] *Id*.
[45] Coders were to determine whether an item was likely to make a "typical undecided voter" more inclined to vote for Gore than Bush or vice versa. *Id.* at 6-7.
[46] *Id.* at 7.
[47] *Id.* at 7. The study does not appear to have considered morning or early evening newscasts, other news bulletins, or station editorials, if any.
[48] *Id*.
[49] *See* R.J. Brown, *Producing a Newspaper 1792-1892*, (last visited Dec. 9, 2002) www.historybuff.com/library/refnews1792.html.

a similar study in additional communities.[50] However, Pritchard does not disclose that the earlier study was funded by Quebecor Media, Inc,[51] one of Canada's premier broadcast and newspaper owners with substantial publishing interests in the U.S.[52] The original study found no evidence of ownership influence on the coverage of the 2000 presidential campaign.[53] Given the outcome of Pritchard's earlier study and the source of his funding, Pritchard's research can hardly be considered objective and disinterested.

But even accepting Pritchard's conclusion for purposes of argument, the scope of the study is too limited to apply to other situations. The study sample is an inadequate proxy for the national media marketplace as it is based upon a small sample of only ten newspaper-broadcast combinations, four of which are held by a single company (Tribune);[54] other types of media combinations in markets varying in size are not considered. Moreover, the study considers only a single, unprecedented national issue—the 2000 presidential election—with no attempt to show that media owners' actions with regards to coverage of this single issue is representative of their actions on a wide variety of local, regional, and national issues. In sum, the Pritchard study provides no basis for departing from the Commission's traditional view that maximizing the number of media owners will lead to greater viewpoint diversity.

C. The Public Interest Requires that Broadcast Stations Provide Programming on Local Issues and Provide an Outlet for Local Self-Expression

In addition to access to diverse viewpoints on important public issues of all types, the public must have access to programming on local issues and opportunities for community self-

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[50] Pritchard Study at 3.
[51] David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed. Comm. L. J. 31, 31 n.1 (2001) ("Pritchard Quebecor Study").
[52] Quebecor Homepage (last visited Dec. 13, 2002) www.quebecor.com/htmen/0_0/0_4.asp.
[53] Pritchard Quebecor Study at 49.
[54] *Id.* at 5.

expression. UCC *et al*. agree with the Commission that localism continues to be a very important goal.[55]

In the 1934 Communications Act, Congress expressed its intent to supply each locality with the means to create and broadcast local programming by mandating equal distribution of licenses and frequencies to each community.[56] Designed to provide communities with outlets for self-expression,[57] section 307(b) requires that "the Commission shall make such distribution of licenses … among the several States and communities as to provide a fair, efficient, and equitable distribution of radio serve to each."[58] The Commission implemented section 307(b) by providing for "a large number of communities to obtain television assignments of their own" so as to realize "the advantages that derive from having local outlets that will be responsive to local needs."[59] The Commission expected that local stations would produce local programming tailored to their community's needs.[60]

The Commission has continually emphasized the need to provide locally-oriented programming even while eliminating quantitative guidelines for news and public affairs programming and formal ascertainment requirements. In *Deregulation of Radio*, the Commission found that:

> Whether the obligation is described as one to serve the specific interests of the community, to meet the tastes, needs and desires of the public or to address the needs and problems of the community, the chief concern has always been that issues of importance to the community will be discovered by broadcasters and will be addressed in programming so that the informed public opinion, necessary to the functioning of a democracy, will be possible. Accordingly, we will require

[55] NPRM at ¶ 71.
[56] 47 U.S.C. § 307(b).
[57] *See FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 362 (1955) (noting that section 307(b) recognized local need for community radio mouthpiece); *Pinellas Broad. Company v. FCC*, 230 F.2d 204, 205 (D.C. Cir. 1956.), *cert. den*. 350 U.S. 1007 (1956) (explaining that § 307(b) encompasses "community needs for programs of local interest and importance and for organs of local self-expression").
[58] 47 U.S.C. § 307(b).
[59] *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 FCC 148, 172 (1952).
[60] *Id.*

> that stations program to address those issues it [sic] believes are of importance to the community.[61]

In upholding the Commission's *Radio Deregulation Order*, the court emphasized that the Commission rejected a strict market approach in favor of "selective deregulatory steps, all of which rely upon retention of a 'bedrock obligation' – that each radio station must discuss issues of concern to its community of license."[62]

Similarly, in deregulating television, the Commission maintained the obligation "to provide programming responsive to issues of concern to its community of license."[63] Citing to its earlier *Radio Deregulation Order*, the Commission explained that "issue-responsive" programming would consist of public affairs, public service announcements, editorials, free speech messages, community bulletin boards, and religious programming, but would not generally include entertainment programming.[64]

Congress also affirmed the importance of local broadcasting when it passed the Cable Television Consumer Protection and Competition Act in 1992. The Act requires cable systems to carry local broadcast stations based on its finding that "a primary objective and benefit of our nation's system of regulation of broadcast television is the local origination of programming."[65] Similarly, in 1999 Congress passed the Satellite Home Viewer Improvement Act promoting the

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[61] *Deregulation of Radio*, 84 FCC 2d 968, 982 (1981), recon. 87 FCC 2d 797 (1981), *aff'd in part*, *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1982) (footnotes omitted).
[62] *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1420 (D.C. Cir. 1982) (citations omitted).
[63] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076, 1091-92 (1984), recon. 104 FCC 2d 358 (1986), *aff'd in part*, *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).
[64] *Id.* at 1091-92 n.54.
[65] Pub. L. No. 102-385 § 2(a)(10), 106 Stat. 1460 (1992). The Senate Committee cited the importance of broadcast television's local service to justify these "must carry" rules. S. Rep. No. 102-92, at 42 (1992).

retransmission of local broadcast stations' programming via satellite based on the importance of localism.[66]

Despite the continued affirmation of localism as a goal, the public lacks sufficient community-focused programming and opportunities for self-expression. The recent Commission proceeding on low power radio illustrates the continued unfulfilled demand for local issue-oriented programming and opportunities for local self-expression. The Commission first proposed low power radio in 1999 after receiving "petitions for rulemaking and related comments indicating substantial interest in, and public support for, increased citizens' access to the airwaves."[67] In response to the proposal, the Commission received "comments and letters from thousands of individuals and groups seeking licenses for new radio stations."[68] The Commission has licensed 63 LPFM stations and granted 445 construction permits thus far, and 3,073 applications are still pending.[69] Moreover, the Commission receives "tens of thousands of inquiries" each year from individuals and groups interested in starting their own low power radio station.[70] Such a strong demand for LPFM highlights the public's ongoing interest and need for local self-expression despite any proliferation of media outlets.

Any further consolidation of local broadcast outlets would hurt the public interest by limiting citizens' access to important local information and hindering the ability of local organizations from getting information to the public. Non-profit community groups depend on local media coverage for their public education and advocacy efforts. As demonstrated in letters

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[66] *Satellite Home Viewer Improvement Act of 1999,* Pub.L. No. 106-113, 113 Stat.1501, at app. I at 1501A-523 & 544 (1990), codified at 47 U.S.C. § 338(a)(1) ("*Satellite Home Viewer Improvement Act*"); H. Rep. No. 106-464 at 92 (1999).
[67] *Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2207 (2000).
[68] *Id*.
[69] FCC, *Low Power FM Broadcast Radio Stations* (last visited Dec. 20, 2002) www.fcc.gov/lpfm (scroll down to "LPFM Search").
[70] FCC, *Low Power FM Broadcast Radio Stations* (last visited Dec. 20, 2002) www.fcc.gov/mb/audio/lowpwr.html.

attached to these comments, the ability of such groups to reach the public has already been limited due to industry consolidation.[71]

Any further consolidation of broadcast news outlets threatens to make the current competition for local coverage even tighter. When news outlets merge, the opportunities for local broadcast coverage decrease. Executive Director Kevin Graff of Mobilize Against Tobacco for Children's Health (MATCH), a coalition of organizations dedicated to reducing tobacco use in Connecticut, explains:

> This year, MATCH sent a video news release about a secondhand smoke advertising campaign in support of clean air legislation to all Hartford television stations. Yet only one, the ABC affiliate WTHN, ran a story about the campaign
>
> . . .
>
> But for WTHN's coverage of this story, viewers in the Hartford media market would likely have missed the story entirely.[72]

Similarly, a reduction of media outlets will reduce citizen access to essential local government and voting information.[73] Local television stations have already been criticized for inadequate of coverage of local and state political issues. A recent analysis of 4,850 local television news broadcasts in the fifty largest markets found that only 37% carried any campaign coverage.[74] Similarly, radio stations have cut back on coverage of local government and

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[71] For example, the Director, Public Health & Medical Accreditation of the Medical Society of New Jersey, which educates the public about important health issues such as tobacco control, immunization and obesity, writes that "Local television and radio coverage in New Jersey is scarce because the state is situated directly between the large New York and Philadelphia media markets. … Any reduction in news outlets or news departments would only exacerbate the current difficulty associated with acquiring news coverage." Letter from Lawrence Downs to Chairman Michael K. Powell, Dec. 15, 2002. Similarly, the Associate Director of Advocacy for the New York City American Cancer Society explains that in New York, due to the level of competition for press coverage, "[o]ften press coverage is simply not available for important health issues as high profile news stories occupy local broadcast news teams. Any reduction in broadcast news outlets or news departments would only make a difficult situation even more challenging." Letter from Carimine Rivetti to Chairman Michael K. Powell, Dec. 18, 2002. See also Letter from Vincent DeMarco, Maryland Citizens' Health Initiative, to Chairman Michael K. Powell, Dec. 17, 2002.

[72] Kevin Graff, Executive Director, MATCH, letter to Chairman Michael K. Powell, Dec. 15, 2002.

[73] *See infra* Parts III.A. & IV.

[74] Press Release, Political Ads Dominate Local TV News Coverage, Nov. 1, 2002, *available at* www.wispolitics.com/freeser/pr/pr0211/nov01/pr02110146.html. This study by the USC Annenberg School's Norman Lear Center and the Department of Political Science at the University of Wisconsin-Madison found that in

politics. A news-talk radio consultant and former radio program director in New York recounted that, "[u]ntil five years ago, there was usually one serious news station in a good-sized town, with reporters who actually went to city hall and knew the mayor."[75] With fewer local media outlets, government officials and political candidates will be forced to jockey for time on fewer stations. Moreover, citizens will also increasingly turn to national sources, which do not cover local issues,[76] and consequently will be less informed and less likely to take an active role in civic affairs.[77]

Thus, having multiple, competing local news outlets helps to ensure that citizens are informed about important health, election, and other issues and that non-profit community groups and political candidates have an opportunity to get their messages to the public.

D. Promoting Ownership Opportunities for Women, Minorities and Small Businesses Serves the Public Interest

The public interest goals of diversity, competition and localism are closely related to another public interest goal: providing ownership opportunities for minorities, women, and small businesses to own broadcast stations. The NPRM seeks comments on whether, and how to adopt

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"an average broadcast, voters saw just 39 seconds of total news coverage about political campaigns, but over a minute of political ads. *Id.* A survey of local television journalists also found that television reporters were "deeply concerned about their stations' commitment to local government news, in terms of allowing reporters to report thoroughly and then, giving airtime and prominence to that coverage." David C. Coulson, *et al.*, *Erosion of Television Coverage of City Hall? Perceptions of TV Reporters on the Beat*, 78 Journalism & Mass Comm. Q. 81 (2001).

[75] Marc Fisher, *Blackout on the Dial: In Much of the World [of] Commercial Radio, News Has Become an Elusive Commodity*, Am. Journalism Rev., Jun. 1998, at 44 ("Fisher").

[76] For example, a few weeks before the 2002 Congressional elections, cable news networks devoted most of their coverage to national or international news stories and allotted minimal coverage on local Congressional races. Jim Rutenberg, *National TV Focuses on Sniper, But Local Stations Pick Up the Slack on Political Coverage*, N.Y. Times, Oct. 24, 2002, at A20.

[77] Waldfogel found that more local media products are available in larger market and that "tendency to use national media, relative to the tendency to use local media, is larger as markets are smaller." Joel Waldfogel, *Consumer Substitution Among Media* 17, 19, 20, 34 (Sept. 2002). Waldfogel notes that "[a]lthough there is some evidence that small groups substitute nonlocal media (such as cable and Internet) for local media where local products are unavailable, this substitution does not generate behavioral neutrality." He cites as an example, research that shows that readers of national newspapers are less likely to vote in local elections. *Id.* at 40-41.

measures that foster ownership by diverse groups such as women, minorities, and small businesses, and whether it has the authority to foster diversity of ownership.[78] UCC *et al.* urge the Commission to reaffirm that the promotion of ownership opportunities for women, minorities, and small businesses is an important policy goal that the Commission should explicitly advance through its ownership rules.[79]

Female and minority-owned businesses continue to own only a tiny fraction of television and radio stations.[80] Industry consolidation impedes the ability of minorities and women to obtain and keep broadcast stations. For example, concentration in the radio industry has led to increased station prices, which has exacerbated long-standing problems that minorities and women have faced in obtaining financing.[81] Moreover, the substantial increase in the size of group owners[82] has led to decreases in advertising revenues for minorities and women who tend to own smaller, stand-alone and AM stations that lack the audience reach and resources enjoyed by larger, consolidated stations.[83]

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[78] NPRM at ¶ 50.

[79] UCC *et al.* support the detailed comments filed by NOW in this proceeding.

[80] *See* U.S. Dep't of Commerce, National Telecommunications and Information Administration Minority Telecommunications Program, *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States* ("NTIA") (2000) (finding that of the 10,577 commercial AM and FM radio stations licensed in the U.S. in 2000, only 4% were minority-owned, and of the 1,288 full power commercial television stations licenses in the U.S., only 1.9% were minority-owned, representing the *lowest level* of minority television ownership since NTIA began collecting data in 1990); *see also* Annenburg Public Policy Center, *The Glass Ceiling in the Executive Suite: The 2nd Annual APPC Analysis of Women Leaders in Communication Companies* at 4 (2002), *available at* www.appcpenn.org; Press Release, Most Influential Women in Radio, Annual Gender Analysis Released by MIW (Aug. 7, 2002), *available at* www.radiomiw.com/pr_cmfl/pr.cfm (collectively showing that women are underrepresented in broadcast station management, an indication that they hold few ownership positions).

[81] Ivy Planning Group LLC, *Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present* 14, 38-39 (Dec. 2000) (radio station prices have increased from the hundreds of thousand dollar price range to the multi-million dollar price range).

[82] *See* George Williams & Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance,* FCC Media Bureau 3-4 (Sep. 2002) ("Williams & Roberts Study") (noting that since passage of the Telecommunications Act in 1996, the number of radio stations has increased by 5.4%, but the number of radio station owners has decreased by 34% and the size of radio broadcast group owners has increased substantially; as of March 2002, the largest group owned 1151 stations and the second largest group owned 256 stations).

[83] *See* NTIA at 29.

If broadcast group owners are allowed to own even more stations, opportunities for women, minorities, and small businesses to own stations will be further reduced; thus, ownership limits are necessary. The Communications Act of 1934, as amended, provides ample authority and indeed requires the Commission to promote ownership opportunities for women, minorities, and small businesses.[84]

In sum, the ownership rules serve multiple public interest goals including the public's First Amendment interest in having an "uninhibited marketplace of ideas in which truth will ultimately prevail," competing sources of local and national news and other informational programming, coverage of local issues and opportunities for local self-expression, and opportunities for minorities, women and small businesses to own and operate broadcast stations.

II. SEC. 202(h) DOES NOT IMPOSE A HEIGHTENED STANDARD FOR EVALUATING WHETHER OWNERSHIP REGULATIONS ARE IN THE PUBLIC INTEREST

In addition to seeking comment on public interest goals, the NPRM invites comment on the standard for determining whether to modify, repeal or retain broadcast ownership rules under section 202(h) of the 1996 Act. Section 202(h) provides that the Commission shall review its ownership rules on a biennial basis and "shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest." [85] Specifically, the NPRM asks whether section 202(h)'s "phrase, 'necessary in the public interest,' mean[s] we must repeal a

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[84] *See* 47 U.S.C. § 257 (2002) (The Commission must identify and eliminate "market entry barriers for entrepreneurs and other small businesses" by "favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity"); 47 U.S.C. § 309(j) (2002) (The Commission must award all commercial broadcast licenses for which mutually exclusive applications are filed, except those in three exempt categories, by competitive bidding. In doing so, the Commission must "promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women").

[85] Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996).

rule unless we find it to be indispensable? Or does the phrase mean that we can retain a rule if we would be justified under the current circumstances in adopting it in the first instance because the record shows that it serves the public interest?"[86]

The plain meaning of section 202(h) is that Congress intended the Commission to regularly review its broadcast ownership rules to evaluate if they are still needed due to the perceived increase in competition in media outlets. If the Commission finds that a rule is no longer in the public interest, it should repeal or modify the rule. The "no longer in the public interest" language indicates that the Commission should its apply usual public interest analysis in deciding whether to modify or repeal a rule.

The meaning of the phrase "necessary in the public interest" can only be understood in the context of the Communications Act. The word "necessary," and the related word "necessity" appear repeatedly throughout the Communications Act. Indeed, the very same phrase, "necessary in the public interest," is employed in section 201(b), which provides that the Commission "may prescribe such rules and regulations as may be *necessary in the public interest* to carry out the provision of this Act." [87] This phrase has never been understood to limit the Commission to adopting only rules found to be indispensable.[88] Similarly, section 154(i)'s authorization to the Commission to "make such rules and regulations, … not inconsistent with this Act, as may be *necessary* in the execution of its functions," section 303(r)'s provision that

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[86] NPRM at ¶18. UCC *et al.* generally agree that the Commission correctly interpreted the meaning of section 202(h) in its rehearing petition in *Fox Television. FCC Petition for Rehearing or Rehearing En Banc, Fox Television Stations, Inc. v. FCC*, D.C. Cir. No. 00-1222 (Apr. 19, 2002) ("Rehearing Petition"). There, the Commission demonstrated that "'necessary in the public interest,' when viewed in the context of the rest of the 1934 and 1996 Acts, means 'in the public interest,' or useful or appropriate." *Id.* at 5-11. The D.C. Circuit responded to the FCC's Petition for Rehearing by deleting its earlier conclusion that "a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." Because the meaning of section 202(h) had not been fully briefed and resolution of the issue was not necessary to its decision, the court left the question open. *Fox Television Stations, Inc. v. FCC,* 293 F.3d 537, 540 (D.C. Cir. 2002).

[87] 47 U.S.C. 201(b) (emphasis added).

[88] Rehearing Petition at 6.

the Commission shall adopt rules "*necessary* to carry out the provisions of this Act," and the section 309's mandate that the Commission grant license applications only where it finds that the "public interest, convenience and *necessity* would be served," do not limit the Commission to only adopting rules or granting applications that have been found to be indispensable to the public interest.[89]

Interpretation of the phrase, "necessary in the public interest" also requires examination of the meaning of the phrase "in the public interest." Whether a regulation is necessary to serve the public interest is not susceptible of precise determination in the way that a factual question, such as whether a piece of equipment is necessary to obtain a type of telecommunications service.[90] By delegating the Commission the authority to adopt, retain, modify and repeal rules in the public interest, Congress afforded great discretion to the Commission.[91] Thus, the Commission could reasonably find that a regulation is necessary in the public interest, in the sense that it serves the public interest or promotes a public interest objective, even though it might not be indispensable.

To interpret necessary to mean indispensable not only fails to comport with the context of the statute, but would have the illogical result of making adoption of a new rule easier than retention of an existing one.[92] Given the well known principle of administrative law that the

[89] The only example cited by the Fox petitioners where the word "necessary" has been interpreted to mean indispensable is section 251(c)(6). 296 F.3d at 539. That section imposes a duty on telecommunications carriers to provide "for physical collocation of equipment necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Here, the word "necessary" is used in a different context, i.e., whether a piece of equipment is technically necessary for a certain telecommunications service rather than whether something is in the public interest.

[90] *Cf. GTE Services Corp. v. FCC*, 205 F.3d 416, 422-24 (D.C. Cir. 2000) (discussing whether equipment is necessary for interconnection or access to unbundled network elements).

[91] *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-94 (1981); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

[92] Rehearing Petition at 8-11.

same standard applies to repealing or modifying a rule as adopting a rule in the first instance,[93] the statute cannot logically be read to require a higher public interest showing for retaining an existing rule. Moreover, because the statute requires the Commission to review its ownership rules every two years, application of the higher standard would strain agency resources to the point of "threaten[ing] agency paralysis"[94] and would create much disruption and uncertainty in the broadcasting industry.[95] Surely, Congress did not intend such a result.

Contrary to arguments of those opposing rehearing in *Fox*, "interpreting 'necessary' to mean merely 'useful' would not render § 202(h) 'a virtual nullity.'"[96] Prior to passage of section 202(h), the Commission reviewed ownership rules only where a Petition for Rulemaking was filed or where the Commission, on its own, determined that such a review was desirable. Section 202(h) changes pre-existing law by requiring the Commission to review all of its broadcast ownership rules every two years and to modify or repeal those found to no longer serve the public interest. Moreover, if the Commission declines to repeal or modify, aggrieved parties have the right to appeal that decision.

In sum, if current circumstances would justify adopting the rule in the first instance, the Commission must retain that rule under section 202(h).[97] Section 202(h) does not require a

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[93] *See, e.g., Motor Vehicle Mfrs. Ass'n. v State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).
[94] Rehearing Petition at 2. Indeed, because section 11 uses similar language for biennial review of telecommunications regulations, the burden on the Commission would be quite substantial. *See* Cellular Telecommunications & Internet Association's Petition for Rulemaking Concerning the Biennial Review of Regulations Affecting CMRS Carriers, July 25, 2002 , at 1-5 (arguing that the biennial review of all regulations that apply to the operations and activities of any provider of telecommunications service under Section 11, 47 U.S.C. § 161(b), subjects such regulation to a more stringent standard than the plain public interest standard found in other parts of the Communications Act).
[95] *Id*. at 12
[96] 293 F.3d at 540.
[97] If anything, an even lesser showing should be required because the normal presumption is that existing regulations are in the public interest, and the burden is on those who seek to change the regulation to show that the change is in the public interest. The *Fox* court's observation that section 202(h) creates a presumption in favor or repealing or modifying the rule, 280 F.3d at 1048, is not supported. *See* Rehearing Petition at 9, n.1.

showing that a rule is indispensable for it to be retained if it advances the public interest, as the ownership rules do.

III. NEITHER CHANGES IN THE MEDIA MARKET NOR PROLIFERATION OF MEDIA OUTLETS WARRANTS ELIMINATION OR RELAXATION OF BROADCAST OWNERSHIP LIMITS

In its efforts to determine whether ownership rules are "necessary in the public interest as a result of competition," the Commission asks whether, in light of an increase in the number of media outlets, "the marketplace will protect and advance diversity without regulatory requirements."[98] However, when the current media marketplace is closely examined, the diversity of news and public affairs available to the public is actually quite limited. First, the majority of the public still relies on broadcast television, newspapers, and to a lesser extent, broadcast radio, for news and community information. Second, other media such as cable, DBS, and the Internet provide little or no original news and public affairs programming, are not widely available, or are not used by the public; thus, these media are not adequate substitutes for broadcast television.

A. While the Public Continues to Primarily Rely on Local Broadcast Stations and Newspapers for News and Public Affairs, the Amount and Diversity of this Information is Decreasing even as the Number of Broadcast Stations has Increased

Broadcast television, radio, and daily newspapers continue to be the most important sources of local news and information for the public.[99] The Nielson Survey commissioned by the FCC found that, when asked what sources were used in the past seven days for local news,

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[98] NPRM at ¶ 42.
[99] Nielsen Media Research, *Consumer Survey on Media Usage* 22 (2002).

85% of consumers used television, 63% used newspapers, and 35% used radio.[100] When asked what was the single source used most for local or national news and current affairs, 33% cited broadcast television, 23% named local newspapers, 23% cited cable or satellite news channels, and 10 % cited radio.[101] Similarly, a survey conducted by the RTNDA Foundation in 1998 found that "more than any other medium, local television is identified by Americans as their primary news source. Half of Americans say they use local television newscasts on a daily basis and another 25% use this medium several times per week."[102]

Television stations, in particular, play a leading role in shaping democratic debate. For example, in recent survey commissioned by NAB, 44% of respondents said that local broadcast television and radio stations' news reports and coverage of candidate debates were "most helpful" in deciding how to vote.[103] Americans turn primarily to television for important non-political local news as well. For example, despite the advent of newer media, the number of homes using television in the Washington, D.C., area rose about 20% on average during the recent sniper crisis as area residents sought the latest information on the story primarily from television.[104]

Because consumers rely primarily on more traditional sources for local news and information, the Commission must particularly focus on the viewpoint diversity that actually exists at local levels from these sources. Outlets that do not address local issues or merely recycle national or other sources will not contribute to diversity or advance the Commission's goals.

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[100] *Id.* at 1.
[101] *Id.* at 22.
[102] RTNDF Journalism Ethics and Integrity Project, *available at* www.rtnda.org/researchy/survey.pdf.
[103] Eighteen percent found newspaper coverage most helpful. "Nationwide Poll Finds Broad Voter Approval of Broadcast Election Coverage," *results available at* pdf link from www.nab.org/newsroom/pressrel/default.asp, released Oct. 30, 2002. The poll was conducted Oct. 25-28, 2002, by Wirthlin Worldwide and commissioned by the National Association of Broadcasters.
[104] Dan Trigoboff, *Washington TV, Stretched and Spent*, Broadcasting & Cable, Oct. 28, 2002, at 7.

1. Broadcast Television

Even though consumers primarily rely on broadcast television for news and information and the number of broadcast stations has increased,[105] many stations do not provide a significant amount of local news and public affairs programming.[106] The RTNDA Surveys on news indicate that both the number of local television news departments and the total amount of news on the air have decreased in recent years.[107]

Similarly, Professors Loy A. Singleton and Steven C. Rockwell studied all full power commercial stations in the top 50 markets and determined the extent of news and public affairs programming by analyzing data from station websites if available, and if not, using published broadcast schedules.[108] They found that the average DMA had 3.2 television stations with no

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[105] NPRM at ¶ 24.

[106] Since the FCC eliminated guidelines for news, public affairs and non-entertainment programming as well as program log requirements in 1984, obtaining accurate information about the quantity of news and public affairs programming actually broadcasted is more difficult. *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076, 1-2 (1984). In 2000, the FCC sought comment on a proposal to require television stations to routinely disclose this information to the public. *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd 19816 (2000) *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd 19816 (2000). Despite comments from the public that such information would be extremely useful, the Commission has never acted on this proposal. *See*, *e.g.*, Comments of Office of Communication, Inc. *et al.*, Docket No. 00-168 (Dec. 18, 2000).

[107] Bob Papper & Michael Gerhard, 2002 Staffing/Amount of News Research, *available at* www.rtnda.org/research/staff.html ("RTNDA Staffing Survey 2002") (finding that "[a]fter generally steady increases, the amount of news actually dropped 5 percent in the most recent survey compared to the year before. The average weekday amount of news fell by 15 minutes.") *Compare* RTNDA Staffing Survey 2002 (733 local television news departments running news on 834 stations) *with* Bob Papper & Michael Gerhard, 2001 Staffing/Amount of News Research, ("RTNDA Staffing Survey 2001") *available at* www.rtnda.org/research/staff_2001.html (851 stations producing local news).

[108] Loy A. Singleton, Silent Voices: Contrasting the FCC "Media Voices" Standard for Limiting Local Radio-Television Cross-Ownership with a National Survey of Local Television News and Public Affairs Programming, Law and Policy Division, Broadcast Education Association Convention (Apr. 2001) at 15-16.

local news or public affairs programming.[109] A total of 162 stations in the 49 DMAs did not offer any local news or public affairs programming.[110]

The Commission staff study by Spavins *et al.*, *The Measurement of Local Television News and Public Affairs Programs,* also found that many network-owned or affiliated stations offered no public affairs programming. The Spavins Study measured the amount of local news and public affairs of network owned and operated stations and network affiliates in all markets that had at least one station owned by a major television network.[111] Of the 130 stations examined, 89 had no local public affairs programming and, of those that did, most presented only one-half hour per week.[112] The *Spavins* Study did not evaluate non-network affiliated stations, which typically air even less news and public affairs programming.

2. Radio

While the number of radio stations on the air has increased, diversity and local programming have declined or remained stagnant. A recent survey found that one quarter of radio listeners think that radio stations do not air enough national and local news.[113] Since the deregulation of radio in 1981 and the consolidation of the radio industry after 1996, many radio stations have eliminated or reduced news programming.[114]

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[109] *Id*. at 16. These findings are consistent with a 1998 study of television news and public affairs programming in five cities (Chicago, Phoenix, Nashville, Spokane, and Bangor) which found that 35% of the stations surveyed provided no local news and 25% offered neither local public affairs programming nor local news. Media Access Project and Benton Foundation, *What's Local about Local Broadcasting?,*Joint Report, Apr. 1998, *available at* radiodiversity.com/localbroadcasting.html.

[110] Singleton at 16.

[111] Thomas C. Spavins *et al.*, *The Measurement of Local Television News and Public Affairs Programs*, App. A (2002) ("Spavins Study"). Thirty-two markets fit the criteria, the majority of which are top-50 markets.

[112] *Id*. The study reports that "[f]or local public affairs programming, we identified an totaled all programs that were locally produced and could be categorized objectively as public affairs programming." *Id.* at 2. Despite UCC *et al.*'s inquiries with the study author, the Commission has not disclosed the source of data or program classification criteria.

[113] Future of Music Coalition, Radio Deregulation: Has It Served Citizens and Musicians? 86 (Nov. 18, 2002).

[114] *See* RTNDA 2001 Staffing/Amount of News Research, *available at* www.rtnda.org/research/staff_2001.html (between 1994 and 2001, the number of full-time staff in radio newsrooms decreased an average of 43.8% and the number of part-timers dropped 71.4%). Since radio stations are no longer required to keep logs, it is difficult to get a

Consolidation in the radio industry has further decreased the number of different viewpoints and local relevance of programming available in local communities.[115] Large radio owners have streamlined operations by using automated programs and syndicated programming instead of deejays and locally-produced programming.[116] Joint ventures between television and radio conglomerates frequently utilize the same news program services in an effort to reduce costs.[117] Widespread use of this standardized programming has not only reduced the quantity of independent sources but also made the news itself less relevant to local needs.[118]

3. Newspapers

In contrast to broadcast stations, the number of daily newspapers has been decreasing.[119] But, like broadcasting, the newspaper industry has experienced increasing consolidation.[120] Most importantly, the diversity of viewpoints available in a community has been further reduced in many markets by sharing of resources between broadcast stations and newspapers.

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complete picture of the number of stations providing news and public affairs and how much. Nonetheless, the RTNDA surveys demonstrate a substantial decrease in both the size of radio news staffs and the amount or radio news. The RTNDA Staffing Survey 2001 found that "the size of the typical radio newsroom [fell] 56.7 percent, from 4.5 newspeople in 1994 to 1.95." While staff size did not drop the following year, the survey found that radio news departments were handling news on "more and more stations. Last year, 47 percent of news directors returning the survey supervised the news on one station only; this year just 25 percent handled one station." RTNDA Staffing Survey 2002. Moreover, the number of news directors overseeing five or more stations jumped from 3 % to 24.2 % in the past two years. *Id.* The 2002 RTNDA Staffing Survey also found that on weekdays, "the amount of radio news is down 7.3 percent from the year before (which was down from the year before that). The amount of news on the weekend also fell."

[115] *See infra* Part IV.A.

[116] *See, e.g.,* Paul Farhi, *Mega Hurts: Clear Channel's Big Radio Ways Are Getting a Lot of Static These Days*, Wash. Post, May 29, 2002, at C1; Dale Smith, *Hello, Honolulu and Amarillo, My Austin Secret Is… I'm Your DJ*, Austin American-Statesman, Jul. 22, 1999, at E1. (DJs located in Austin, unbenownst to listeners, broadcast to stations in several states); Tim Cuprisin, *WOKY Yanking 2 Weekend Programs Winslow*, Milwaukee J. Sentinel, Nov. 28, 2001, at 12B (industry consolidation leads to less local weekend public affairs programs and more Westwood One syndication programming).

[117] Katy Bachman, *Music Outlets Tune In More News Reports*, Media Week, Oct. 21, 2001.

[118] Tim Cuprisin, *Attack on America; Sister FM, AM Stations Air Simulcasts*, Milwaukee J. Sentinel, Sep. 14, 2001, at 7B.

[119] For example, the number of daily newspapers decreased from 1,745 in 1980 to 1,468 in 2001. Newspaper Association of America "Facts About Newspapers," *available at* www.naa.org/info/facts02/12_facts2002.html. Similarly, the percentage of the adult population that are weekday readers declined from 66.9% in 1980 to 54.3% in 2001. *Id.* at www.naa.org/info/facts02/4_facts2002.html.

[120] Eighty percent of newspapers were owned by corporate chains in 1989. David Croteau & William Hoynes, *The Business of Media: Corporate Media and the Public Interest* 101 (2001).

For example, in Tampa, Florida, Media General owns television station WFLA, the *Tampa Tribune*, and Tampa Bay Online and houses them all in the same building;[121] in the same market, a competing television station is sharing news "resources and personalities" with a newspaper.[122] Similarly, West Virginia Media Holdings, LLC has decided to move its weekly newspaper, including employees and equipment, into the building housing its television station.[123] Critics of the West Virginia Media Holdings move believe the two media will lose their individual identities and that local news will suffer if the newspaper and television station fail to compete with each other.[124] Even the owner's representations portend a loss of local news diversity: the company argues that it can exploit its joint ownership by "reus[ing] news and information products" or "repurpos[ing] them in derivative forms" by airing a newspaper story as television report or providing details from a television story in a newspaper or on a news website.[125]

Media owner Belo also follows a "convergence" strategy: the company has combined its television stations, newspapers, online operations and cable news into regional groups in Texas, the Pacific Northwest, and the Southwest.[126] In all of these markets, viewers lose the opportunity to access three different viewpoints, instead getting the same point of view from a television station, the newspaper, and online. Consumers also lose the benefits of competition between different media: While at one time the heads of the Dallas Morning News and WFAA-TV

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[121] *Birmingham, Ala. Television Executive to Manage Tampa, Fla. Station,* Knight-Ridder Tribune Business News, Jul. 12, 2001, 2001 WL 24478250; Gil Thelen, *Collaboration Helped Make the Tribune Stronger in 2000*, The Tampa Tribune, Dec. 31, 2000, Florida/Metro, at 2.
[122] *Times, Channel 10 Teaming Up*, The Tampa Tribune, Jan. 16, 2001, Florida/Metro, at 2.
[123] Jacob Messer, *Under One Roof: Weekly Business Newspaper, TV Station Will Share Space, Expertise*, Charleston Daily Mail, Jul. 15, 2002, at P1D.
[124] *Id.* (quoting area college professor expressing concern that there will be problems with diversity of content and news decisions).
[125] Comments of West Virginia Media Holdings, LLC, *Cross-Ownership of Broadcast Stations and Newspapers*, MM Dkt. No. 01-235 (Dec. 3, 2001), at 5.
[126] Jeremy Murphy, *Hard News for Hard Times: Texas-Based Media Giant Belo Hopes to Marry Its Long Tradition of Solid Journalism with a New Company-Wide Mandate for Convergence to Emerge from the Recession and Impress Wall Street*, Mediaweek (Apr. 8, 2002).

considered the other "our best competition," today corporate parent Belo has the entities sharing news with each other as well as a Belo-owned Texas cable news channel.[127]

In sum, not even the local broadcast and print sources primarily relied upon by the public provide sufficient viewpoint diversity and locally-oriented programming in today's market. Thus, ownership limits are more necessary than ever to preserve and encourage viewpoint diversity in local markets. Duplication of such insufficient programming through different outlets does not foster an informed citizenry nor promote a democratic society and is, therefore, an inadequate basis to relax current ownership limits even further.

B. Other Media Outlets such as Cable, DBS and the Internet Do Not Provide Much Additional Diverse or Local Content to the Public

The NPRM invites comment regarding the contributions of other media such as cable, DBS, the Internet, and magazines to diversity and competition.[128] As explained below, many of the outlets that the Commission has identified as participants in the modern media marketplace do not make significant contributions to viewpoint diversity and localism.

1. Cable Television

Cable systems provide multiple channels of video programming to subscribers. As noted in the NPRM, cable television is available to the "vast majority of TV households."[129] Nonetheless, only about 64% of households subscribe to cable. The ever-increasing monthly subscription costs prevent cable from being as widely adopted or relied upon as the broadcast media.[130]

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[127] *Id.*
[128] NPRM at ¶¶ 23-28, 45, 102,119-124.
[129] NPRM at ¶ 25.
[130] Since the passage of the 1996 Telecommunications Act, cable rates have increased by over 40%. *See* Dr. Mark Cooper (Director of Research, Consumer Federation of America) & CALPIRG, "Protecting the Public Interest Against Monopoly Abuse by Cable Companies: Strategies for Local Franchising Authorities in the AT&T/Comcast

Moreover, many cable systems do not contribute to localism or viewpoint diversity at the local level. A cable system contributes to viewpoint diversity and localism only if it includes channels that present local informational and public affairs programming to the public, such as public, educational, and governmental access (PEG) channels or local news channels.[131] Although the Communications Act permits cable franchise authorities to require PEG channels,[132] many do not. Only 10 to 15% of the communities in the country have PEG channels at all.[133] Even where such channels are provided, the extent and quality of programming varies.[134] Furthermore, surveys suggest that few viewers regularly watch PEG channels.[135]

Very few cable systems offer local news channels, and the number of these channels has declined over the past several years.[136] Only 22 local or regional cable news channels are

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License Transfer Process," at 2 (May 7, 2002) (*available at* www.consumerfed.org/ATTComcastlocal.2002.05.07.pdf). For the year ending July 1, 2001, alone, the Commission found that the average monthly charge for cable programming service and equipment increased by 7.5%, from $34.42 to $36.99. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Report on Cable Industry Prices*, 17 FCC Rcd 6301, 6303 (2002).

[131] *See Review of the Commission's Regulations Governing Television Broadcasting,* 14 FCC Rcd 12903 at ¶ 113 (deciding that cable system could be one voice if it offers PEG and other local channels).

[132] 47 U.S.C. § 531.

[133] *See* Alliance for Community Media, Getting Media Access (last visited Dec. 30, 2002) www.alliancecm.org/awareness/access.htm.

[134] *Id*.

[135] For example, a 1997 viewer survey showed that only 13.2% of cable subscribers in Santa Barbara, Calif., watched the city government access channel at least once per week, and only 16.4% watched the channel at least once per month. City TV 18 Mission Statement, Policies and Goals, *available at* www.citytv18.com/htm/mission.htm. Likewise, only 28% of those polled in Wheaton, Ill., responded that they watched their city government access channel one half hour or more each month. Wheaton Community Television Benefits Report, *available at* www.gatvinstitute.org/wctv_report.htm (year 2000 data). And, only 24% of respondents in Roseville, Minn., watched telecasts of the Roseville City Council Meetings during the past six years; only 31% had watched public access and/or educational programs. City of Roseville Executive Summary for the 1998 Resident Survey, *available at* ci.roseville.mn.us/info/summary.htm. Similarly, only 2.2% of Austin, Tex., cable viewers responded that they "often" watched City of Austin Government Access, and only 1.7% said that they "often" watched Travis County Government Access City of Austin Telecom & Cable Survey 1998 Summary, *available at* www.ci.austin.tx.us/telecom/srvsumm.htm. Only 18% and 10.9%, respectively, responded that they watched these channels even "sometimes." *Id.* The survey also indicated low viewership of educational access and public access in Austin. Regarding educational access, 7.2% said they watched "often," and 28.5% said they watched "sometimes." For public access, 5.6% said they watched "often," and 26.6% said they watched "sometimes." *Id.*

[136] *Compare* Radio-Television News Directors Foundation, *Non-Stop News A Look at 24-Hour Local, Cable News Channels, News in the Next Century,* (1999), *available at* www.rtnda.org/resources/nonstopnews/executive.html (identifying 34 channels) *with* Broadcasting and Cable Yearbook 2002-2003, at F-78 (identifying 22 local cable news channels).

currently available across the country, five of which serve the New York metropolitan area.[137] Moreover, many of the local or regional cable news channels are not independent sources of viewpoint diversity because they are controlled by another media owner in the same market.[138] For example, News Channel 8 in Washington, D.C., is owned by Albritton, which also owns the local ABC affiliate, and it runs ABC News programming after it has been broadcast on WJLA.[139]

Other local cable news channels are owned by and share resources with local newspapers. In Chicago, the Tribune company owns CLTV, the 24-hour cable news channel, along with the *Chicago Tribune*, WGN-TV, WGN radio, and websites for each entity.[140] According to CLTV's news director, "[t]he purpose of CLTV is to utilize the resources of the newspaper."[141] In addition to sharing resources with the *Tribune*, CLTV runs WGN-TV's newscasts after they have aired on the broadcast station.[142] Similarly, cable news channel "Six News Now" in Sarasota, Florida, is owned by local newspaper *The Sarasota Herald-Tribune*.[143] The prevalence of cross-ownership and resource-sharing indicates that cable television's contribution to viewpoint diversity and localism is limited at best.

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[137] Broadcasting & Cable Yearbook 2002-2003, at F-78 (listing New York 1 News, News 12 Connecticut, News 12 Long Island, News 12 New Jersey, and News 12 Westchester).

[138] *See* Radio-Television News Directors Association & Foundation, "Non-Stop News: A Look at 24-Hour Local Cable News Channels," *available at* www.rtnda.org/resources/nonstopnews/contents.html (1999); *see, e.g.,* Bay News 9 in Florida is owned and operated by Time Warner Cable, Tampa Bay Division. Broadcasting & Cable Yearbook 2002-2003, at F-78. New York 1 News is also owned by Time Warner. New York 1 News, *available at* www.NY1.com.

[139] News Channel 8, *available at* www.newschannel8.net; Thomas C. Spavins *et al.*, *The Measurement of Local Television News and Public Affairs Programs*, App. A (2002). *See also* News Channel 8, *available at* www.newschannel8.net.

[140] Radio-Television News Directors Association & Foundation, "Non-Stop News: A Look at 24-Hour Local Cable News Channels," *available at* www.rtnda.org/resources/nonstopnews/contents.html (1999).

[141] *Id.*

[142] *See* CLTV Entertainment, *available at* http://cltv.trb.com/entertainment/ (click on "check our listings" to view a programming guide, which shows that "WGN News At Noon" airs at 1 p.m. on CLTV).

[143] The cable channel and the newspaper share a newsroom, and reporters for each entity contribute to the other's product. Radio-Television News Directors Association & Foundation, *Non-Stop News: A Look at 24-Hour Local Cable News Channels*, *available at* http://www.rtnda.org/resources/nonstopnews/contents.html (1999); *see also* HeraldTribune.com: Southwest Florida's Information Leader, *available at* http://www.heraldtribune.com/apps/pbcs.dll/section?Category=SNN.

The 24-hour cable news networks identified by the Commission—Fox News Channel, CNN, and MSNBC—are targeted to national audiences and provide the same programming and editorial viewpoint in each community nationwide. For example, a few weeks before the 2002 Congressional elections, these cable networks devoted most of their coverage to national or international news stories and allotted minimal coverage on local Congressional races.[144] Thus, while these networks arguably contribute to diversity at the national level,[145] they fail to further advance viewpoint diversity at the local level.

2. DBS

Direct Broadcast Satellite ("DBS") service is generally available nationwide, but is used by only about 15% of television households.[146] Because DBS subscribers must pay monthly subscription fees and purchase or lease a receiving dish, DBS is not as accessible to consumers as broadcast.[147]

Like cable, DBS is not a sufficient substitute for local news and public affairs programming. DBS operators generally provide the same programming nationwide, and the national news services offered via DBS are identical to those offered via cable. Even though DBS operators retransmit local broadcast channels in some markets,[148] the programming merely

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[144] Jim Rutenberg, *National TV Focuses on Sniper, But Local Stations Pick Up the Slack on Political Coverage*, N.Y. Times, Oct. 24, 2002, at A20.

[145] Fox and NBC already reach virtually all households by means of their television networks, while CNN's parent company, AOL-Time Warner, also has multiple means of reaching the public.

[146] *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming (8th Annual Report)*, 17 FCC Rcd 1244, 1247, 1272 (2002) (noting that as of June 2001, 86.4% of television households subscribed to multichannel video programming services and 18% of these households were DBS subscribers).

[147] NPRM at ¶ 25; *see 8th Annual Report,* 17 FCC Rcd 1244, 1272. DBS operators charge subscription fees of at least $22.99 per month and charge additional fees for local channels. *See* EchoStar website, *available at* http://www.dishnetwork.com and Direct TV website, *available at* http://www.directv.com (both listing subscription packages and fees). Receiving dishes range in cost from $24.99 to $150. *See* Satellite TV Systems from BestBuy.com at http://www.bestbuy.com/HomeAudioVideo/SatelliteTV/Systems.asp; Radio Shack Product, at http://www.radioshack.com/category.asp?catalog%5Fname=CTLG&category%5Fname=CTLG%5F002%5F002%5F002%5F000&Page=1.

[148] Local channels are currently available to DBS subscribers in only about 45 of the 210 television markets in the country. *See* GAO, *Telecommunications: Issues in Providing Cable and Satellite Television Services*, Report to the

duplicates programming already available in the community. Thus, DBS does not independently contribute to viewpoint diversity at either the local or national level.

3. The Internet

As with cable and DBS, the public's increasing use of the Internet has not necessarily enhanced viewpoint diversity and localism. First, almost 46% of Americans do not regularly use the Internet.[149] Although Internet availability and use are rising nationwide, the costs associated with Internet access (which also requires telephone access and monthly fees) discourage many lower-income people from obtaining access.[150] While 79% of U.S. households with a family income of $75,000 or above had Internet access in 2001, only 25% of households with income of less than $15,000 had Internet access.[151]

Further, evidence suggests that most people use the Internet as a means of obtaining the same information that is already available from broadcasting and newspapers. A recent survey found that 62% of Internet users who go online for local news visit newspaper websites, while 39% visit television station websites.[152] In 51 of 81 metro markets surveyed, local adults used

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Subcommitee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate, at 4 (Oct. 2002); *Satellite Home Viewer Improvement Act*, 47 U.S.C. § 338(a)(1).

[149] United States Department of Commerce (Economics and Statistics Administration & National Telecommunications and Information Administration), *A Nation Online: How Americans are Expanding Their Use of the Internet*, 73 (Feb. 2002).

[150] *Bringing a Nation Online: The Importance of Federal Leadership*, report by the Leadership Conference on Civil Rights Education Fund and the Benton Foundation with support from the Ford Foundation, at 7 (July 2002). The two largest Internet service providers, America Online and MSN, charge $23.90 and $21.95 per month, respectively, for dial-up access. For broadband service, AOL charges $54.95 per month and MSN charges $39.95 to $49.95 per month. *See* Marge Brown, "MSN Takes on AOL—Again," *PC Magazine*, Oct. 15, 2002 , *available at* http://www.pcmag.com/print_article/0,3048,a=32352,00.asp and http://www.pcmag.com/article2/0,4149,634753,00.asp.

[151] *Bringing a Nation Online: The Importance of Federal Leadership*, report by the Leadership Conference on Civil Rights Education Fund and the Benton Foundation with support from the Ford Foundation, at 8 (July 2002).

[152] Barb Palser, *Losing Out: Local TV Management Should Get Serious About the Web*, Am. Journalism Rev., Sep. 3, 2002, at 70.

daily newspaper websites more than other news and information sites.[153] Internet websites of a local broadcast station or newspaper generally offer the same or similar content as the station's newscast or the newspaper. For example, a recent case study of nine local broadcast Internet news operations found that few local television stations develop original content for the web—writers, editors, and producers of Internet content simply reprocess television station content.[154] Thus, since much of the news Internet users obtain is merely "re-purposed content" from other media outlets, the Internet does not advance the goals of viewpoint diversity and localism.

4. DARS

Recent additions to the media landscape include two Digital Audio Radio Service ("DARS") systems—XM Radio and Sirius. However, less than 1% of the national population uses DARS.[155] Even though both are available throughout the continental United States, equipment and monthly subscription fees pose a barrier to their widespread use.[156] More importantly, DARS systems do not provide any coverage of local news or issues.[157] The national news channels provided are the same sources, such as Fox News and CNN, that are widely available on other outlets.[158] Finally, DARS systems are not truly independent from other media

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[153] *Id.* S*ee also* Nielsen Media Research, *Consumer Survey on Media Usage* 20 (Sep. 2002) (finding that of respondents who obtained news from Internet sites, 28% had visited MSN.com or MSNBC.com in the past seven days, and 19 percent had visited CNN.com).

[154] Radio-Television News Directors Association & Foundation, *Local Web News: Case Study of Nine Local Broadcast Internet News Operations*, *available at* http://www.rtnda.org/study/casestudy.shtml.; Bob Papper, *Newsstaff Pitch In, Do Double Duty on WebSite*, Communicator*,* June 2002, *available at* http://www.rtnda.org/research/web02.shtml (indicating that regular news room reporters also write for websites).

[155] NPRM at ¶ 26 (combined, these services have only about 140,000 subscribers nationwide).

[156] XM Radio costs $9.99 per month, and Sirius costs $12.95 per month. XM Radio Buyers Guide, *available at* www.xmradio.com/service_subscription.html (visited Nov. 25, 2002); Sirius Satellite Radio Products and Services, *at* www.siriusradio.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1019257316815 (visited Nov. 25, 2002).

[157] *See* www.xmradio.com/programming/neighborhood.jsp?hood=news (visited Nov. 25, 2002); http://www.siriusradio.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1019257316809 (noting that both websites list the news programming available to subscribers, and no local stations are included.).

[158] *See* Frank Ahrens, *XM Cuts 80 Jobs To Save Money*, Wash. Post, Nov. 14, 2002, at E5. XM Radio and Sirius offer no local news channels but only national or international channels such as Fox News, CNN, ABC News and Talk, CNBC, and BBC World Service. *See* XM Radio News, *available at*

outlets. For example, Clear Channel's investment in XM Radio helped launch the subscription radio service.[159] Thus, DARS outlets do not advance the goals of localism or viewpoint diversity at the local level.

5. Other Print Media

Magazines and weekly newspapers do not substantially contribute to localism and viewpoint diversity on local levels. The Nielsen Media Research survey found that only 6% of consumers used magazines in the past seven days for local news and current affairs, whereas 85% used television, 63% used newspapers, and 35% used radio.[160] The same survey found that 62% of consumers who get their local news from a newspaper read a daily newspaper, and only 10% read a local weekly paper.[161] Moreover, local weekly newspapers are typically targeted at small communities within the market, not the entire market.[162]

In sum, neither new technologies, such as cable, DBS, the Internet, and DARS, nor magazines and weekly newspapers, obviate the need for ownership rules. Careful examination of the number of distinct sources of local news and informational programming that consumers actually have available and use reveals that the number of such sources is quite small. Further relaxation or repeal of existing ownership rules would diminish this already limited diversity to the detriment of the public interest goals identified above.

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www.xmradio.com/programming/neighborhood.jsp?hood=news (listing XM Radio's news channels); Sirius Satellite Radio Talk Channel, *available at* www.siriusradio.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1019257316809#genre_1 (listing Sirius's news channels).

[159] *See* Frank Ahrens, *XM Cuts 80 Jobs To Save Money*, Wash. Post, Nov. 14, 2002, at E5. Clear Channel, among other media holdings, owns more than 1,200 radio stations nationwide. *Id.*

[160] Nielsen Media Research, *Consumer Survey on Media Usage*, at 1 (2002).

[161] *Id.* at 7.

[162] For example, weekly papers published in the New York DMA include dozens of such papers, such as *Great Neck News* in Great Neck, New York, *East Orange Record* in East Orange, New Jersey, and *Upper West Side Resident* in Manhattan.

IV. RECENT HISTORY SHOWS THAT REPEAL OR SUBSTANTIAL LIBERALIZATION OF THE OWNERSHIP RULES WOULD NOT BE IN THE PUBLIC INTEREST

The repeal of the national radio ownership limits in 1996 and the substantial liberalization of the local television and radio ownership rules in 1999 has already resulted in increased concentration of control of the media and consequent reductions in viewpoint diversity, localism, and opportunities for minorities and women to own broadcast stations. Repeal or further liberalization these rules would further erode the Commission's public interest goals.

A. Consolidation in Radio has Resulted in Less Diversity and Less Responsiveness to Local Needs and Interests

The radio industry underwent substantial consolidation after repeal of the national radio ownership cap and liberalization of the local limits in 1996.[163] The Commission's study, *Radio Industry Review 2002*, found that from 1996 to 2002, the number of radio station owners declined by 34% while the number of stations actually increased.[164] The largest station owner, Clear Channel Communications, grew from 65 stations in 1996 to more than 1,200 radio stations in March 2002.[165]

Others have also documented the extensive consolidation. UCC's study of ownership and market concentration in 33 local radio markets, which was submitted in the Local Radio Proceeding, also found a dramatic decline: between 1993 and 2001, 28 markets saw a drop in independent owners even though the total number of stations increased.[166] The study by the Future of Music Coalition found that ten companies command two-thirds of both listeners and

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[163] Williams & Roberts Study at 6.
[164] *Id.* at 3. The average metro market went from 13.5 owners to 9.9 *Id.*
[165] *Id.*
[166] Comments of the Office of Communications Inc. of the United Church of Christ, MM Dkt No. 01-317, filed Mar. 27, 2002, Attach. 1.

advertising revenues.[167] Moreover, it found that in virtually all local markets, four companies control 70% or more of the market.[168]

This massive consolidation of radio stations has resulted in many instances of reduced diversity in local programming, particularly in news and public affairs. Large group owners obtain efficiencies by reducing local staff, eliminating local news production, and relying on centralized operations or national radio networks for programming. By cutting costs in this manner, group owned stations increase profits and put economic pressure on smaller station owners to adopt the same practices in order to compete.[169]

At the same time that stations ownership has become more concentrated, so has the ownership of radio program networks. Four companies—ABC Radio Networks, American Urban Radio Networks, Premiere Radio Networks, and Westwood One Radio Networks—operate all 33 radio networks rated by Arbitron.[170] Collectively, these 33 networks reach 75% of consumers during a typical week.[171] Westwood One, which is managed by Infinity Broadcasting Corp., a wholly owned subsidiary of Viacom, Inc., alone provides news, entertainment, sports, talk and traffic programming to more than 7,700 radio stations.[172] Similarly, Clear Channel subsidiary Premiere Radio Networks, Inc. provides radio programming to more than 7,800 radio affiliates.[173]

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[167] Peter D. Cola & Kristin Thomson, *Radio Deregulation: Has It Served Citizens and Musicians?* Future of Music Coalition, at 24-25 (Nov. 18, 2002) ("Future of Music Coalition Study").

[168] *Id.* at 34. *See also* George Winslow, *Security in Numbers*, Broadcasting & Cable, Sep. 9, 2002, at 32. (noting that top 25 radio groups increased both in the total number of stations and share of total advertising revenue in 2001 compared to 2000).

[169] Future of Music Coalition Study at 34. Clear Channel's rivals such as Cumulus Media, the Infinity Radio unit of Viacom, and Citadel Communications are adopting a similar approach in an attempt to compete. Lynnley Browning, *Making Waves on Air: Big Radio's Bad Boy*, N.Y. Times, June 19, 2002, at C1.

[170] *Arbitron Releases December 2002 RADAR Radio Network Ratings*, Business Wire (Dec. 16, 2002)

[171] *Id.*

[172] Westwood One Company Profile, www.westwoodone.com/aboutus_co_profile.asp (visited Dec. 30, 2002); Hoover's Online, "Westwood One, Inc. Capsule," www.hoovers.com/co/capsule/5/0,2163,15155,00.html (visited Dec. 30, 2002).

[173] www.clearchannel.com./radio/premiere.php.

With deregulation and consolidation, many radio stations have already ceased to provide any news programming.[174] Those that do provide news are increasingly replacing locally gathered and produced news with programming from these handful of networks. Radio stations have little incentive to provide their own local news as these programming services are provided free of charge to radio stations: the networks make money by attaching an advertisement to the end of the newscasts.[175] Indeed, Westwood One's subsidiary, Metro Networks, Inc./Shadow Broadcast News Services, supplies news and related programming to over 2,000 radio and television stations[176] and reaches more than 80 of the largest MSA markets.[177] Neither Metro nor Shadow have street reporters; instead, employees re-package headlines from local newspapers and local cable news channels.[178]

The public is harmed both by the replacement of locally produced news with network news and with the lack of competition in radio network news. As pointed out by the program director of all-news radio station WTOP, "There used to be a crowd of radio people at news events. … most radio newspeople these days are holed up in their bunker rewriting copy. The public loses because there are fewer reporters out asking questions."[179] Similarly, a public

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[174] *See supra* Part III A.(2). For example, WWNZ in Orlando had an award-winning news staff of six people until its owner, Clear Channel, decided to eliminate the news department and air news produced by Metro Networks. Marc Fisher, *Blackout on the Dial: In Much of the World [of] Commercial Radio, News Has Become an Elusive Commodity*, Am. Journalism Rev., Jun. 1998, at 44 ("Fisher"). The Washington, D.C. radio stations owned by Clear Channel have no formal news departments and produce none of their own news, instead purchasing programming from news providers. Paul Farhi, *Mega Hurts: Clear Channel's Big Radio Ways Are Getting a Lot of Static These Days*, Wash. Post, May 29, 2002, at C1. This reliance on outside sources leaves listeners with fewer choices for breaking local stories. For example, on September 11, 2001, Clear Channel's Washington, D.C.-area AM stations had no personnel to cover the Pentagon attack and instead simulcasted the audio track from a local television station. *Id.*

[175] Fisher at 44.

[176] www.westwoodone.com/MS_news.asp.

[177] www.westwoodone.com/aboutus_co_profile.asp (visited Dec. 30, 2002) Westwood, which already owned Shadow, acquired Metro Networks in 1999. *Id.* Until then, Shadow and Metro were the two main competing providers or radio news. *See, e.g.,* Fisher (describing Metro and Shadow and "the two behemoths of the outsourcing trend" and observing that in most of the top 75 markets, "Metro, Shadow or some combination of the two provide not only traffic and weather reports, but also the newscasts on virtually all the stations in town").

[178] Fisher at 44.

[179] *Id.*

relations consultant in Vermont points out, that "[a]s a result of the elimination of the radio ownership rules, Vermont now has virtually no independent local news coverage anywhere in the state. Radio outlets that once had local reporters and covered local events, have consolidated and regionalized, effectively ending local radio news."[180]

Obtaining news programming from these outside sources not only reduces coverage of local issues and fails to add any new information or diverse local viewpoints, but also curtails listeners' opportunities for self-expression.[181] Clear Channel has been widely criticized for replacing local deejays with recorded or syndicated programs, or their out-of-town counterparts.[182] As a result, listeners cannot call their local deejay or talk show host to get more information about a local event or voice an opinion. Stations rarely disclose that the voice on the local station is broadcasting from out of town.[183] These and other similar practices that are commonly adopted by owners of multiple stations nationwide may save a company money, but the public loses the benefits of localism from a purportedly local medium.

B. Relaxation of the Television Duopoly Rule and the Television-Radio Cross Ownership Rule has Led to Reduced Local Television News Programming

The public has also experienced a loss of local television news programming as a result of changes in the television duopoly rule and radio-television cross-ownership rule. In 1999, the Commission relaxed these rules to allow common ownership of up to two television stations and

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[180] Letter from Jennifer Wallace-Brodeur to Chairman Michal K. Powell, Dec. 18, 2002 (attached).

[181] *See supra* Part I.C.

[182] Lynnley Browning, *Making Waves on Air: Big Radio's Bad Boy*, N.Y. Times, Jun. 19, 2002, at C1.

[183] Such deception has resulted in a fine from the Florida attorney general for misleading listeners who competed in radio contests through their local stations without realizing that Clear Channel was running the contests nationwide, thus reducing contestants' chances. *Id.*

six radio stations in the same market.[184] As a result, today there are at least 75 duopolies and an additional 20 station pairs that have local marketing agreements.[185]

Common ownership of two television stations in the same market reduces the amount and variety of local programming because co-owned stations consolidate staff and resources that produce local information. In Los Angeles, for example, CBS's two television stations share a news director,[186] as do the two stations owned by Fox in that market.[187] In New York, Fox's two television stations share a general manager, [188] creative director,[189] and some newsgathering resources.[190] Reportedly, the only obstacle to a complete merger of the newscasts is the employee unions.[191] Even worse, in Detroit, where Viacom's duopoly once shared news-gathering resources, the company has decided to stop producing local news altogether. Instead, its UPN station will air news produced by a competing station and its CBS station will air no news at all.[192] These combinations of resources hurt viewers because viewers lose an independent source of local news with each duopoly-forming merger.

The detrimental impact on localism and diversity resulting from the relaxation of the radio-television cross-ownership rule is further illustrated by the Clear Channel's acquisition of the Ackerley Group.[193] The Commission permitted Clear Channel, already licensee of over 1200 radio stations, to purchase 16 television stations, which created new radio/television

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[184] *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903. Under the current television duopoly rule, broadcasters are allowed to own two television stations in the same market as long as their signals do not overlap or one of the stations is not among the four highest-ranked stations in the market, and at least eight independently owned and operated full-power television stations remain.
[185] Bill McConnell, *Duopolies: The Pair Necessities; Broadcasters Maneuver for Room to Form More TV Combos in Smaller Media Markets*, Broadcasting & Cable, Jan. 21, 2002, at 58.
[186] Dan Trigoboff, *Musical Chairs in L.A.*, Broadcasting & Cable, Jun. 10, 2002, at 15.
[187] Dan Trigoboff, *Station Break*, Broadcasting & Cable, Oct. 14, 2002, at 20.
[188] Michelle Greppi, *The Insider,* Electronic Media, Nov. 19, 2001, at 8.
[189] *Who Is News*, Electronic Media, May 6, 2002, at 34.
[190] Chris Pursell, *Joint Effort in Television Land: Fox's New York competitors WNYW, WWOR work together post-attack*, Electronic Media, Sep. 17, 2001, at 3.
[191] Karissa S. Wang, *Duopoly Dilemma: Two Stations, Two Unions*, Electronic Media, Mar. 11, 2002, at 2.
[192] John Smyntek, *Channel 50's Exodus Aids Channel 7's News*, Detroit Free Press, Dec. 4, 2002.
[193] *See, e.g., Shareholders of the Ackerley Group et al.*, 17 FCC Rcd 10828, ¶¶ 7, 8 (2002).

combinations in eleven communities, including Syracuse, Binghampton, Utica and Watertown, New York.[194] Shortly after acquiring these stations, the *Watertown Daily Times* reported that the Clear Channel television station in Watertown "has ceased its morning, noon and weekend news broadcasts, although it will begin a local morning news show produced in Birmingham in July."[195] The Clear Channel stations in Binghampton and Utica have also replaced their local morning newscasts with this regional news program.[196] A single, regional newscast produced in Binghampton, which is located near Pennsylvania, cannot sufficiently meet both the needs of residents of Binghampton and Watertown, which is located over 143 miles away near the Canadian border.

Thus, repeal or relaxation of ownership rules has already eroded viewpoint diversity, eliminated competing sources of news, and reduced locally-produced programming. For these reasons, the Commission should refrain from any further relaxation or repeal and only modify its rules as discussed below, to respond to the court remands in *Sinclair* and *Fox* and to better achieve the intended public interest goals by eliminating outdated exceptions.

V. THE COMMISSION SHOULD RETAIN EXISTING OWNERSHIP RULES WITH SOME MODIFICATION TO BETTER SERVE THE PUBLIC INTEREST

As explained above, any proliferation in media outlets has not obviated the need for ownership limits. In fact, as evidenced by the radio industry, recent relaxation of ownership

[194] *Id.* at 10828-29. In five communities, the combinations violated the radio-television cross-ownership limits and the FCC granted a 12 month waiver to come into compliance. In Syracuse, NY, Clear Channel now owns 1 television and 7 radio stations, in Binghampton, NY, 1 television and 6 radio stations, in Utica, NY, 1 television and 10 radio stations. None of these markets has enough independent voices to permit the combinations. Clear Channel must divest either one television station in each market or one radio station in Syracuse, two in Binghampton and four in Utica to stay within ownership limits. *Id.* at 10832-10833 app. A (2002).

[195] Brian Kelly, *WWNY News Continues to Dominate Ratings as WWTYI Revamps,* Watertown Daily Times, June 17, 2002, at 30.

[196] William Large, "Clear Channel Consolidating Same Staff," *The Post Standard*, July 6, 2002, at D2. Because the morning news program will be produced in Binghampton, Clear Channel made staffing cuts in Watertown and Utica. *Id.*

restrictions has eroded localism, diversity, and competition. Thus, to ensure the public interest is served, the Commission should, at a minimum, retain the existing rules with certain modifications. UCC *et al.* focuses comments here on the television duopoly rule, the national television limits and the dual network rule, but also urge the Commission to retain its other ownership regulations.[197]

A. The Commission Can and Should Justify Counting Only Broadcast Television Stations as Voices For Purposes of the Television Duopoly Rule

The NPRM invites comment on possible changes in the local television multiple ownership rule, also known as the television duopoly rule.[198] The local television multiple ownership rule prohibits common ownership of two television stations licensed in the same DMA unless at least one of the stations is not among the top four stations in the DMA and at least eight independently owned and operating, full-power commercial and non-commercial television stations would remain in the DMA post-merger.[199]

As the Commission explains,[200] the D.C. Circuit Court of Appeals remanded the local television multiple ownership rule to the Commission for reconsideration in the *Sinclair* case.[201] The court held that the Commission had not adequately justified the different definitions of voices in the local television multiple ownership and radio-TV cross-ownership rules.[202] The local television multiple ownership rule counts only independently owned and operating full-

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[197] *See* Comments of the Office of Communication, Inc. of the United Church of Christ, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making,* MM Dkt. Nos. 01-317 and 00-244 (Mar. 27, 2002); Comments of the Office of Communication, Inc. of the United Church of Christ, National Organization for Women and Media Alliance, Cross-Ownership of Broadcast Stations and Newspapers, *Order and Notice of Proposed Rule Making*, MM Dkt. No. 01-235 (Dec. 3, 2001).
[198] NPRM at ¶ 72.
[199] 47 C.F.R. § 73.3555(b).
[200] NPRM at ¶¶ 17, 76.
[201] *Sinclair* 284 F.3d at 162.
[202] *Id.*

power broadcast television stations as voices.[203] In contrast, the radio-TV cross-ownership rule counts the following as voices: independently owned and operating full-power broadcast television stations in the DMA, independently owned and operating broadcast radio stations in the radio metro market, English-language newspapers published at least four days a week in the DMA that have a circulation exceeding 5% of the households in the DMA, and one cable system if cable television is generally available to households in the DMA.[204]

In light of the remand in *Sinclair*, the Commission invites comment on whether and how to apply a voice test for a local television ownership rule.[205] The Commission can and should justify counting only broadcast television stations as voices for purposes of the duopoly rule because, as the *Sinclair* court found, "the Commission adequately explained how the local ownership rule furthers diversity at the local level and is necessary in the 'public interest' under § 202(h) of the 1996 Act."[206]

Using the guidance of the *Sinclair* decision, the Commission can now provide additional justification for retention of a specific local television broadcast rule. As demonstrated by these comments, no other media outlets are adequate substitutes for broadcast television. Recent studies and data provide ample evidence beyond the previously-cited Roper Study[207] indicating that Americans continue to rely on broadcast television as their primary source of local news and

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[203] 47 C.F.R. 73.3335(b)(2)(ii).
[204] 47 C.F.R. 73.3335(c)(3).
[205] NPRM at ¶ 77.
[206] *Sinclair* 284 F.3d at 160.
[207] The court criticized the Commission's reliance on the Roper Study because while the study did show that most people obtained their news from television, the study did not distinguish between broadcast and non-broadcast television or local or national news. *Id.* at 163.

information.[208] Particularly in times of crisis, "Americans overwhelmingly turn[] to television … and most of them tune[] to their local broadcast stations."[209]

In accord with being the most used, broadcast television is the most widely available medium. Unlike many other media outlets, broadcast television service does not require subscription fees; it is free to the public.[210] Because over 98% of households receive broadcast television,[211] broadcast television use does not create a "digital divide" problem, which is present for low income and minorities with other newer technologies.[212]

Radio, newspapers, and cable lack the requisite consumer reliance and availability to substitute for broadcast television. Even though these media outlets contribute to the "marketplace of ideas" or provide some local information, [213] they do not have the unique primacy of broadcast television are not substitutes for it. In addition to not being as widely used, radio does not have the visual impact or often the same depth of coverage of local issues as does broadcast television.[214] Both newspapers and cable require subscription fees, and cable systems contribute only minimally, if at all, to the viewpoints expressed in a market.[215]

Similarly, newer media outlets such as DBS, Internet, and DARS, which do not count as voices for the purposes of the cross-ownership rule, are not as widely used or available as

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[208] *See supra* Part III.A. (citing the FCC commissioned study by Nielsen Media Research, *Consumer Survey on Media Usage* 22 (2002) and RTNDF Journalism Ethics and Integrity Report, *available at* www.rtnda.org/research/survey.pdf).

[209] Television Bureau of Advertising, Inc., *TV Basics* (2001), *available at* www.tvb.org/rcentral/mediatredstrack/tvbasics/basics33.htmml (citing research by Harris Interactive, Pew Internet and American Life Project, and Nielsen Media Research data on consumer media use after the September 11, 2001 attacks on the World Trade Center and Pentagon).

[210] See *Review of the Commission's Regulations Governing Television Broadcasting*, Separate Statement of Commissioner Michael K. Powell, 14 FCC Rcd 12903, 12988 (1999).

[211] *Review of the Commission's Regulations Governing Television* Broadcasting, 14 FCC Rcd 12903, 12923 (1999); Television Bureau of Advertising, Inc., *TV Basics* (2002), *available at* www.tvb.org/rcentral/mediatredstrack/tvbasics/basics1,html.

[212] *See also supra* Part III. (showing that certain types of media outlets not accessible to majority of population).

[213] *See Sinclair*, 284 F.3d at 162-63.

[214] *See supra* Part III.A.2. (showing that consolidation and automated programming are actually reducing the number of distinct local viewpoints despite any increase in number of radio outlets).

[215] *See supra* Parts III.A.3.& B.1.

broadcast television. These outlets generally retransmit viewpoints and content already available from other sources and require subscription fees, thus effectively reducing availability in comparison to free broadcast television.[216] Moreover, almost 46% of consumers do not use the Internet, 85% do not use DBS, and 99% do not use DARS.[217]

In further recognition of the unique importance of local broadcast television programming, the Supreme Court has upheld the Commission's rules requiring cable companies to carry broadcast programming.[218] Additionally, the Supreme Court has found that broadcast television is the primary source of election information for the majority of Americans.[219] Congress has likewise recognized the importance of local television broadcast signals in allowing DBS to carry local broadcast stations.[220]

As shown above,[221] other media are not sufficient substitutes for broadcast television. This lack of substitutability in combination with the unique attributes of broadcast television warrant separate treatment by the Commission. In directing the Commission to revise its ownership rules, Congress treated radio and television differently in the 1996 Telecommunications Act.[222] In addition, unlike the duopoly rule, which governs only one medium (television), the radio-television cross-ownership rule logically includes consideration of a variety of media because the rule itself governs common ownership of different types of media. Were the exceptions to the television duopoly rule to count the same types of voices as the exception to the radio-television cross-ownership rule, the rules would be duplicative and

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216 *See supra* Parts III.B.2., 3., & 4.
217 *Id.*
218 See *Turner Broad. Sys., Inc. v. FCC* ("Turner II"), 520 U.S. 180 (1997).
219 See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1998).
220 *See* H.R. Rep. No. 106-79 at 11-15 (1999); *Satellite Home Viewer Improvement Act,* Pub.L. No. 106-113, 113 Stat.1501, at App. I at 1501A-523 & 544.
221 *See supra* Part III.
222 Pub. L. No. 104-104, 110 Stat. 56 (1996) § 202(b) (directing Commission to revise local radio caps to allow control of multiple stations depending on number of commercial radio stations in the market); § 202(c)(2) (directing Commission to revise local television ownership rule).

potentially inconsistent. Thus, armed with the record in this proceeding, the Commission can and should justify and reinstate the duopoly rule as necessary to advance its court-sanctioned goals of viewpoint diversity and localism.

If, instead, the Commission decides to rectify the inconsistency criticized by the court in *Sinclair* by adopting the same definition of voices for the television duopoly and the radio-TV cross-ownership rules, it must at the same time, raise the threshold voice count. The court in *Sinclair* noted that "[t]here is an obvious interrelatedness between the Commission's choice of eight and its definition of 'voices'.... On remand the Commission conceivably may determine to adjust not only the definition of 'voices' but also the numerical limit."[223] Because more types of media outlets are included in the radio-TV cross-ownership rule's voice test, the minimum number of post-merger voices should be substantially higher than eight.

Further, the Commission should retain the current prohibition of common ownership of two of the four highest-rated broadcast television stations in a given market, regardless of the total number of voices. The Commission's original rationale for restricting mergers among the top four stations still applies today as broadcast media remains the most dominant source of local news today, and the top four stations generally broadcast local newscasts.[224]

B. The Commission Should Not Expand the Radio-TV Cross-Ownership Rule's Definition of Voices to Include Any Other Types of Media Outlets.

The radio-TV cross-ownership rule currently counts as "voices" independently owned and operating full-power broadcast television and radio stations, one cable system where cable is

[223] *Sinclair*, 284 F.3d at 162.
[224] *See Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12912, 12923, 12931, 12933 (1999) ("[p]ermitting mergers among these two categories of stations, but not among the top four-ranked stations, will consequently pose less concern over the diversity of viewpoints in local news presentation, which is at the heart of our diversity goal."); Nielsen Media Research, *Consumer Survey on Media Usage* 1 (2001).

generally available, and daily newspapers with a circulation of at least 5% of the DMA.[225] The NPRM seeks comment on whether to expand the voice test used for radio-television cross ownership to include media outlets such as DBS, Internet websites, individual cable channels, magazines, and weekly newspapers.[226] As discussed above in section III, these other media outlets are not sufficiently available, used, independent, or providing local information to contribute meaningfully to viewpoint diversity and localism.[227] Consequently, the Commission should not include these media as voices for purposes of its local ownership rules.

C. The Commission Should Retain the National Television Ownership Rule to Preserve Viewpoint Diversity, Localism, and Competition

The NPRM requests comments on the relevance of the national television ownership rule in relation to the goals of viewpoint diversity, localism and competition in the local media marketplace.[228] The national ownership rule continues to serve the public interest, working with local rules to maintain diversity in the media marketplace and allowing affiliates and independent television stations to be responsive to local programming needs. Moreover, the national ownership limits preserve ownership opportunities for minorities, women and small businesses. The "UHF discount" exception to the national television ownership rule, however, is no longer in the public interest and should be repealed.

1. The National Television Rule Ensures Access to Diverse and Locally Relevant Viewpoints

As noted in the NPRM, the Commission has historically limited national broadcast station ownership to maintain both viewpoint diversity and economic competition.[229] Although

[225] 47 C.F.R. 73.3555(c).
[226] NPRM at ¶¶ 102, 114, 119.
[227] *See supra* Part I.C.
[228] NPRM at ¶¶ 129, 159, 168.
[229] NPRM at ¶127.

the Commission concluded in its *1984 Order* that the then seven-station rule was no longer necessary to ensure viewpoint diversity and announced plans to eliminate it,[230] Congress disagreed and adopted legislation that prevented implementation of the order.[231]

Eventually, Congressional leaders and the Commission worked out a compromise in which group owners could own up to twelve stations provided that they reached no more than 25% of the national audience.[232] In the 1996 Act, Congress directed the Commission to increase the national audience cap to 35% and eliminating the limit on the number of commonly-owned stations.[233]

The Commission reexamined the national television ownership rule in the *1998 Biennial Report*.[234] Along with other reasons, the Commission decided to retain the rule to preserve the power of affiliates in bargaining with their networks, thus allowing affiliates to better serve their communities.[235] On appeal, the D.C. Circuit found that the retention of the national television rule was arbitrary and capricious because the Commission failed to reconcile its decision with its finding in the *1984 Order* that the rule was irrelevant to local diversity.[236] In light of these

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[230] *Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17, 18, 54-56 (1984) ("1984 Order"). The 1984 Report raised the ownership limit to 12 during a six-year transition period, after which the rule would be eliminated entirely. *Id.*

[231] Second Supplemental Appropriations Act, Pub.L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984). Both houses approved the measure that denied FCC funding. The legislation ensured that "[n]o funds appropriated by this or any other Act to the Federal Communications Commission may be used to implement the Commission's decision adopted on July 26, 1984, in Docket GEN 83-1009 as it applies to television licenses." *Id. See* Jeanne Saddler, *FCC Postpones New Regulation on TV Stations*, Wall St. J., Aug. 10, 1984 (reporting the FCC pulled back its plan after the Senate voted to bar application of the new rule and the House was expected to take similar action).

[232] Nell Henderson, *FCC Adopts Station Compromise*, Wash. Post, Dec. 20, 1984, at D1. The Commission implemented this compromise in *Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 74 (1985) ¶ 35 ("1985 Reconsideration Order").

[233] *1996 Act*, § 202(c)(1).

[234] *1998 Biennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058 (2000) ("1998 Biennial Report").

[235] *Id.* at 11074-75.

[236] *Fox T.V. Stations Inc. v. FCC,* 280 F.3d 1027, 1044-45 (D.C. Cir. 2002), *reh'g granted in part,* 293 F.3d 537 (D.C. Cir. 2002)

circumstances, the NPRM specifically seeks comment on whether the national television rule is relevant to viewpoint diversity.[237]

(a) Repeal or Substantial Relaxation of the Rule Would Result in the Acquisition of Many Stations by the Major Networks

Eliminating the national television ownership rule would cause a dramatic restructuring of the television industry that could reduce the number of independent voices in local media markets across the country. Just as repeal of the national radio limits has already caused massive consolidation in the radio industry,[238] a similar trend is underway in television broadcasting due to the increase of the television limit from 25% to 35%, allowing the major broadcast networks to increase their audience reach. Viacom, which owns both the CBS and UPN networks, has the largest audience reach; its imputed audience reach, taking into account the UHF discount, is 39.5%, while its actual audience reach without the UHF discount is 45.4%.[239] Fox is a close second with an imputed reach of 38.1% and actual reach of 44.7%.[240] Paxson, which is partially owned by NBC, is third, and NBC is fourth.[241] Even the sixth largest group owner, ABC, has a substantial audience reach—with an imputed audience reach of 23.8% and actual reach of 24%.[242]

[237] NPRM at ¶ 136.
[238] *See supra* Part IV.A.
[239] *Top 25 Television Groups*, Broadcast & Cable, April 8, 2002, at 48. Viacom and Fox have temporary waivers that permit them to exceed the current limits pending the outcome of this proceeding. *See Shareholders of CBS Corporation and Viacom, Inc.*, 15 FCC Rcd 8230 (2000) (permitting Viacom to acquire CBS' broadcast licenses); *UTV of San Francisco, Inc.*, 16 FCC Rcd 14975 (2001) (allowing Fox to acquire 10 television stations from Chris-Craft Industries).
[240] *Top 25 Television Groups*, Broadcast & Cable, April 8, 2002, at 48, 50.
[241] *Id.* at 50, 52. Paxson's 68 stations have an actual audience reach of 65.9%, but only 33.7% are attributed to it because of the UHF discount. NBC has an actual reach of 33.7% and 30.4% including the discount.
[242] *Id.* at 54.

Eliminating or further raising the national television limit would enable these large networks to acquire even more stations.[243] As networks acquire more stations, the number of station owners will decline. However, having a variety of owners is essential to viewpoint diversity because station owners ultimately decide what news, public affairs, and other programming runs on their stations. As shown *supra* in section I.B., owners' decisions about programming may be affected by their economic and political interests. Thus, consolidation reduces the number and diversity of those gatekeepers and is contrary to the public interest in having a diversity of viewpoints.

(b) Increased Network Ownership of Affiliate Stations will Reduce Local News and Public Affairs Programming

While local ownership rules preserve a minimum number of independent voices in each market, the national rule ensures that local voices are themselves owned by a variety of entities rather than a handful of networks. Independent ownership allows for the possibility that different programming decisions will be made in different communities at the local level. For instance, affiliates may replace the network's programming with news and information that meets the needs of their of local communities.

Local affiliate preemption of network programming with news or information that is in the public interest conflicts with the networks' economic interest in having all of their programming aired. Recognizing this tension, the Commission implemented the "Right to

[243] *See, e.g.,* Catherine Yang *et al.*, *Media Mergers: The Danger Remains*, Bus. Wk., Apr. 29, 2002, at 96; Elizabeth A. Rathbun, *Sly Fox Buys Big, Gets Back on Top*, Broadcast & Cable, Apr. 23, 2001, at 59 (noting that NBC has an option to take over Paxson Communications next year if cap is lifted and that Newscorp/Fox TV and Viacom have already expanded beyond 35% nation-wide audience reach cap); Chris Serres, *Broadcast Landscape Shift,* News & Observer (Raleigh, N.C.), Apr. 12, 2002, at D1.

Reject Rule,"[244] which permits local stations to air local programs instead of national network programming when they reasonably believe that it is not in the public interest or another program is of greater local or national importance.[245]

Addressing the harms of broadcast network consolidation on localism and program diversity in the *1998 Biennial Report*, the Commission noted:

> The national networks have a strong economic interest in clearing all network programming, and we believe that independently owned affiliates play a valuable counterbalancing role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and interests of the local communities to which they are licensed.[246]

Even with the Right to Reject Rule, broadcast networks are extremely reluctant to allow preemption and put tremendous pressure on affiliates to run network programming.[247] For example, a Belo-owned ABC affiliate in Dallas, the headquarters of American Airlines, had difficulty getting the network's permission to preempt the November 12, 2001 Monday Night Football halftime show for local news updates on the American Airlines jet crash in New York that morning.[248] The network turned down three different suggestions from the affiliate on how to broadcast the story.[249] The station eventually put together a two-minute news segment that ran at the end of the halftime segment and did not cover up any network material.[250] In another case, CBS pressured a Florida affiliate into running the season premier of "48 Hours" instead of the

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[244] 47 C.F.R. § 73.558. The FCC first recognized this problem in the 1941 Report on Chain Broadcasting noting that "[e]ven after a licensee has accepted a network commercial program series, we believe he must reserve the right to substitute programs of outstanding national or local importance." Report on Chain Broadcasting, *Commission Order* No. 37, Docket No. 5060 (May 1941) at 66, modified, Supplemental Report on Chain Broadcasting (October 1941), appeal dismissed sub nom. *NBC v. United States*, 47 F.Supp. 940 (S.D.N.Y.1942), aff'd, 319 U.S. 190 (1943).
[245] *Id.* (insuring that licenses are given only to stations that have preemption agreements with their network). *See* Wes Allison, *Local PBS Affiliate Will Air Debate*, St. Petersburg Times, Sep. 25, 2002, at 1B.
[246] *1998 Biennial Report*, 15 FCC Rcd at 11074-75.
[247] Wes Allison, *Local PBS Affiliate Will Air Debate*, St. Petersburg Times, Sep. 25, 2002, at 1B.
[248] Michele Greppi, *The Insider: A(BC's) Tale of Too-Different Cities*, Electronic Media, Nov. 19, 2001, at 8.
[249] *Id.*
[250] *Id.*

state's gubernatorial debate. The station had originally planned to run the debate when it was scheduled an hour earlier during non-network programming, but CBS protested when the debate was moved into prime time.[251]

Fortunately for consumers, affiliates often determine that the public interest is better served by broadcasting programs of local interest. In one case, NBC planned to broadcast the American League divisional baseball playoff game at the same time a presidential debate was scheduled during the final months of the 2000 campaign.[252] NBC pressured its affiliates not to preempt the game for the debate, but many affiliates refused.[253] Similarly, some stations thought that an October 7, 2002 speech by President Bush on the conflict in Iraq was more important to its viewers than network prime time programming.[254]

The Right to Reject Rule, however, would be of little value and not operate in the public interest if the networks owned all or most of their affiliates. Relaxing or eliminating the national ownership rule will allow the networks to own more local stations, and these stations will be even more likely to air programs that are in the networks' financial interest rather than the interests of local viewers. Thus, diversifying station ownership at the national level helps to ensure that local needs and program preferences are met.

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[251] Wes Allison, *Local PBS Affiliate Will Air Debate*, St. Petersburg Times, Sep. 25, 2002, at 1B. The general station manager at the CBS affiliate noted that the decision to air "48 Hours" came from pressure by the network, not the station's financial interests. In fact, the programs that the station had originally planned to preempt by the debate, "Wheel of Fortune" and "Jeopardy," make considerably more money for the affiliate than an hour of prime time programming. *Id.*

[252] Neil Hickey, *Unshackling Big Media*, Columbia Journalism Rev., July 2001/Aug. 2001, at 30. Only two major broadcast networks aired the debate live system-wide. While NBC was showing baseball, Fox aired the two-hour premier of its sci-fi drama "Dark Angel." Drew Jubera, *WXIA: Airing Games gave Viewers "Choices,"* The Atlanta J. and Const., Oct. 4, 2000, at 13A; Jonathan Cox, *U.S. Congress Should Speed Digital TV, U.S. FCC Chief Says*, Bloomberg News, Oct. 10, 2000.

[253] Neil Hickey, *Unshackling Big Media*, Colum. Journalism Rev., July 2001/Aug. 2001, at 30. Markets where NBC affiliates opted to preempt the baseball game for the debate included Houston, Detroit, Miami, New Orleans, Orlando, Baltimore, Boston, and Cincinnati. Drew Jubera, *WXIA: Airing Games gave Viewers "Choices,"* The Atlanta J. and Const., Oct. 4, 2000, at 13A.

[254] *Editorial: TV Networks Failed the Public*, Times (Shreveport, La.), Oct. 9, 2002, at 11A. In Louisiana, the local ABC and NBC affiliates broadcast the speech by the president instead of the network programs "Fear Factor" and "Who's Line is it Anyway." *Id.*

(c) The Premises Underlying the *1984 Order's* Conclusion that the National Television Rule was not Necessary for Viewpoint Diversity are No Longer Valid Today

As shown above, national television ownership rules promote viewpoint diversity. The Commission's finding in 1984 that national rules were no longer necessary was rejected by Congress at the time and was based on four factors that are not longer valid today.

First, the Commission's finding that national rules were "irrelevant to the number of diverse viewpoints in any particular community"[255] was explicitly premised on the continued existence of the duopoly rule, one-to-a-market rule, cable-broadcast cross-ownership rule and other local ownership rules. As the Commission explained,

> Media ownership at the national level need not – and *given the Commission's local ownership rules* – cannot reduce the number of independently owned cable, TV and radio outlets available to the individual consumer in his community.[256]

However, these local rules have been either repealed (broadcast cross-ownership rule) or substantially relaxed (TV duopoly rule, radio duopoly rule, and one-to-a-market). Thus, even if the national limits had no effect on diversity in local geographic markets in 1984, the same is not true today when relaxed local rules permit increased consolidation.

Second, the Commission had said that the rule was no longer needed in light of the number of new television stations and the growth of other media providing viewpoint diversity in the market.[257] However, as shown *supra* in Part III, the proliferation of new media outlets has not resulted in the anticipated diversity of news and locally responsive programming.

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[255] *1984 Order*, 100 FCC 2d at 24-25.
[256] *Id*. at 31 (emphasis added).
[257] *Id.* at 25-28.

Third, in issuing the 1984 order, the Commission reasoned that no one had presented any evidence that group owners were suppressing independent viewpoints.[258] Today, however, numerous parties, consumers, and affiliates have provided substantial evidence that group owners do in fact suppress independent viewpoints.[259]

Finally, the Commission relied on scant evidence that group owners provided more or better quality news and public affairs programming than single stations.[260] For example, commenters presented evidence that network- and group-owned stations were more likely than independents to editorialize.[261] Today, due to consolidation, few individually-owned stations remain in the marketplace. Little support exists, however, for any analogous claim that network-owned stations provide more or better news and public affairs programming than other non-network-owned television stations. Indeed, the NPRM itself observes that very few stations, whether networked-owned or not, editorialize at all.[262]

The Spavins Study[263] is at best inconclusive as to whether network owned and operated stations provide superior news and public affairs programming to that of network affiliates. This study compares the two types of stations based on the quantity of news and public affairs programming, ratings of local news, and the numbers of awards received from the RTNDA and the Columbia School of Journalism. Even the study itself notes that all of these measures "are at best imperfect proxies."[264]

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[258] *1984 Order*, 100 FCC 2d at 35.
[259] See *supra* at Parts I.B. & V.C.1.(b).
[260] *Id.* at 32-24.
[261] *Id.* at 34.
[262] NPRM at ¶ 79.
[263] Thomas Spavins, *et al.*, *The Measure of Local Television News and Local Public Affairs Programs* (Oct. 2002).
[264] *Id.* at 1. The National Association of Broadcasters and the National Affiliated Stations Alliance have criticized the study. For example, they note that the study inappropriately averages data of markets that vary greatly in size: "[I]t's not possible to compare 4 stations (all non-network-owned) in Orlando with 4 stations in Marquette, Michigan." *NAB-NASA Tell FCC Study on Local TV News Isn't Acceptable*, Comm. Daily, Dec 10, 2002. Further, the study uses different samples to calculate hours of programming, ratings and awards. The study compiles total

The study found no difference in terms of ratings for local news but found that network-owned stations aired a somewhat larger amount of news and public affairs programming.[265] However, as already noted above, very few stations, whether network-owned or not, aired any public affairs programming.[266]

Even though the study also found that network-owned stations received more awards,[267] the number of awards received by stations is not a reliable measure of quality because the awards are not equally available to both network stations and affiliates. Stations must apply for awards and pay entry fees to be considered.[268] Moreover, networks generally have promotion and publicity departments that handle award entries, while local stations do not.[269] Thus, factors unrelated to program quality can affect the number of awards received.

In sum, the premises underlying the Commission's determination in 1984 that the national rules are not necessary to viewpoint diversity are no longer valid today. The national limits help ensure any remaining viewpoint diversity by allowing local affiliates to provide essential local programming and somewhat level the playing field for women and minorities.

2. Repeal of the Rule Would Further Limit Opportunities for Station Ownership by Minorities, Women and Small Businesses

Repeal or substantial relaxation of the national audience cap would drive most of the remaining small business owners, women and minorities out of the market to the detriment of the public interest.

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hours of local news and public affairs programming to determine station output, but only compares the ratings for early evening news programs. *Id.*

[265] Spavins Study at Part II.B.

[266] *See supra* Part III.A.1.

[267] Spavins Study at Part II. C. & D.

[268] Radio-Television News Directors Association and Foundation, *Awards and Scholarships: 2003 RTNDA Edward R. Murrow Awards*, www.rtnda.org/asfi/awards/murrow.shtml; The Graduate School of Journalism at Columbia University, *Alfred I. DuPont Columbia University Awards*, www.jrn.columbia.edu/events/dupont/entryform.pdf.

[269] E-Mail from Jonnet S. Abeles, Director, Alfred I. duPont Awards, Columbia School of Journalism, Nov. 7, 2002.

In the *1984 Order*, the Commission initially rejected arguments that relaxation of the national ownership limits would have "deleterious effect on minorities."[270] While reaffirming its dedication to expanding minority participation in broadcasting, the Commission noted that other policies, particularly the tax certificate and distress sale policies, existed for that purpose. On reconsideration, the Commission acknowledged that the ownership rules had some role to play, and modified the station limits to allow a minority incentive.[271]

Since that time, however, all three methods of encouraging minority ownership—tax certificates, distress sales, and ownership incentives—have been eliminated. Thus, retaining national ownership limits is the only way left to preserve opportunities for minorities and women to own broadcast stations.

3. The National Ownership Rule Should be Modified to Eliminate the UHF Discount

While relaxation or repeal of the national television limits would have a detrimental impact on both local and national viewpoint diversity without offering any significant countervailing public interest benefits, one aspect of the rule–the UHF discount—is no longer necessary in the public interest and should be repealed. The UHF discount was created when the Commission first adopted percentage limits in the *1985 Reconsideration Order*.[272] This UHF discount reduces the audience share attributed to a UHF broadcaster under the national rule by 50%.[273] In adopting the discount, the Commission explained that "[c]onsistent with the diversity objectives expressed in our ownership rules, we believe that a more appropriate indicator of the

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270 *1984 Order*, 100 FCC 2d at 46.

271 *Id.* Specifically, the Commission decided to allow an entity to have ownership interests in up to fourteen broadcast stations so long as at least two were minority controlled. *Id.*

272 *1985 Reconsideration Order,* 100 FCC 2d 71, 93-94.

273 47 C.F.R. §73.3555(e)(2)(i); *1985 Reconsideration Order,* 100 FCC 2d 71, 93-94.

reach handicap of UHF stations is one that measures the *actual coverage limitation* inherent in the UHF signal."[274]

Today, any actual coverage limitation of UHF stations has been virtually eliminated. Since UHF television signals are retransmitted on cable systems and some DBS systems, households that cannot receive those stations over the air can generally get them on cable or DBS.[275] Cable service availability is now virtually ubiquitous with wires passing to 97% of all homes, up from 75% in 1985.[276] And while only 37 million households subscribed to cable in 1985, 69 million subscribe today.[277]

In addition to cable transmission, DBS gives the public a means that did not exist in 1985 to watch UHF stations.[278] DBS has experienced dramatic growth and, as of 2001, had 16 million subscribers.[279] DBS providers have strong incentives to carry local UHF broadcast programming. Under the Satellite Home Viewer Act's "carry one, carry all" provision, DBS providers cannot discriminate among the local stations they choose to carry.[280] Thus, DBS operators have increasingly made local television stations, including UHF stations, available to their customers.[281]

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[274] *1985 Reconsideration Order,* 100 FCC 2d at 93 (emphasis added).
[275] Amelioration or reduction of technical disparities in audience reach is a distinct issue from whether cable or DBS is a substitute for broadcast television. *See supra* Parts III.B.1. & 2.
[276] Jonathan Levy *et al.*, *Broadcast Television: Survivor in a Sea of Competition* 41 (Sep. 2002).
[277] *Id.* The "must-carry" rules require cable systems to carry local UHF stations. 47 U.S.C.A. §534(a); 47 C.F.R. §76.56.
[278] Jonathan Levy *et al.*, *Broadcast Television: Survivor in a Sea of Competition* 51 (Sep. 2002).
[279] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 67 FR 5600-02, ¶4 (2002) ("9th Annual Report Notice").
[280] *Satellite Home Viewer Improvement Act*, 47 U.S.C.A. §338(c)(2).
[281] *8th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd. 1244, 1247-48 (2001) ("*8th Annual Report*"). EchoStar provides local carriage in 47 markets, including carriage in New York City, Boston, Chicago, Dallas, Miami, San Francisco and Washington, D.C. EchoStar Home Page (last visited October 6, 2002) www.dishnetwork.com /content/ programming/ locals/index.shtm. Similarly, DirecTV provides local broadcast carriage in over 40 markets across the country. DirecTV Home Page (last visited October 4, 2002) www.directv.com/DTVAPP/ LocalChannels Actiondo.

In other recent proceedings, the Commission has recognized that the disadvantages traditionally faced by UHF stations have largely been eliminated. For example, in repealing the Prime Time Access Rule in 1995, the Commission acknowledged that "developments [have] substantially alleviated the technical disadvantages faced by UHF receivers"[282] and that few people have trouble with poor UHF reception.[283] Additionally, when the Commission revised the local television ownership rules, it concluded that sufficient audience parity existed between VHF and UHF to warrant equal treatment of the two signals.[284] The Commission observed that UHF broadcasters are financially successful and that the UHF audience has increased through cable carriage.[285]

The dramatic increase in UHF station reach as a result of cable and DBS transmission has rendered the UHF discount an inappropriate exception to the national television ownership limits. The discount undermines the diversity goal by allowing owners to acquire more stations than the rule would otherwise permit. For example, Paxson's 68 stations have an actual audience reach of 65.9%, but because many are UHF stations, Paxson is attributed a reach of only 33.7%.[286]

Considering the diminution of the audience reach disparity of VHF and UHF, retaining the discount undermines the purposes of the national ownership limits and is not necessary in the public interest.

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[282] *Review of the Prime Time Access Rule, §73.658(K) of the Commissions Rules*, 11 FCC Rcd 546, 583-84 (1995) ("Prime Time Rule").
[283] *Id.* at 585-86.
[284] *Review of the Commission's Regulations Governing Television Broadcasting,* 10 FCC Rcd 4538, 4542 (1995).
[285] *Id.* at 4542-43.
[286] *Top 25 Television Groups*, Broadcast & Cable, April 8, 2002, at 48. Nor is Paxson's situation unique. *See supra* Part V.C.1.(a) for additional examples.

D. The Dual Network Rule Is Necessary to the Public Interest and Should Be Retained to Preserve Viewpoint Diversity

While these comments have focused largely on viewpoint diversity in local communities, diversity of news organizations that report on national and international events is essential to the marketplace of ideas. Access to multiple viewpoints on the national level is also important because consumers turn to non-local sources when their local media outlets are insufficient, as many are today.[287] By prohibiting common ownership of more than one national broadcast network, the dual network rule fosters expression of more than a few national viewpoints in news reporting and provision of supplemental information for consumers.[288]

As noted in the NPRM, the dual network rule was created to ensure diversity as well as competition.[289] In 2000, the Commission modified the dual network rule to allow the four major television networks–ABC, CBS, Fox, and NBC–to acquire UPN and /or WB.[290] While recognizing that its decision would eliminate independent broadcast voices,[291] the Commission ultimately concluded that in view of the financial problems faced by UPN and WB at that time, "failure to relax the dual network rule would likely result in the elimination of a broadcast voice at the national level."[292]

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[287] Joel Waldfogel, *Consumer Substitution Among Media* 17, 19, 20, 34 (Sep. 2002) (observing that more local media products are available in larger market and that "tendency to use national media, relative to the tendency to use local media, is larger as markets are smaller"). Additionally, Waldfogel's study suggested that more isolated consumers such as certain minorities often turn to nonlocal sources when local media fail to meet their needs. *Id.* at 10, 34-37.

[288] *See National Broad. Co. v. U.S.*, 319 U.S. 190, 215-219 (1943).

[289] NPRM at ¶ 157.

[290] *Amendment of Section 73.658(G) of the Commission's Rules—The Dual Network Rule,* 16 FCC Rcd 11114 (2001). The Commission did not propose to allow a major network to acquire another major network because of the high barriers to entry. *Amendment of Section 73.658(G) of the Commission's Rules—The Dual Network Rule, Notice of Proposed Rulemaking*, 15 FCC Rcd 11253, 11263 (2000) (showing that mergers among the major networks would have a harmful effect on the marketplace).

[291] *Dual Network Order*, 16 FCC Rcd at 11127.

[292] *Id.* at 11129.

Today, however, no further relaxation of the rule is needed to rescue failing television networks; on the contrary, broadcast television networks are thriving.[293] Any further relaxation of the dual network rule would unacceptably reduce national viewpoint diversity by eliminating at least one of the four major networks, ABC, CBS, NBC or Fox, and their national news operations.[294] In fact, Viacom, the owner of both the CBS and UPN networks, has already expressed interest in buying NBC.[295]

As discussed above,[296] national broadcast television continues to be the public's most important source for national and international news. Even with the growth of cable outlets and channels, viewers are more likely to watch broadcast network television news than cable network news. The highest cable news ratings do not compete with an average national television broadcast: The average daily reach of NBC Nightly News, ABC World News and CBS Evening News is 34.7 million viewers, about 10 times the combined average reach at 6:30 p.m. for Fox, CNN, CNN Headline News, MSNBC and CNBC.[297]

The consolidation of two or more national news divisions would result in the loss of independent coverage of viewpoints regarding significant national and international events. Because network news on broadcast television is expensive to produce, remaining networks

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[293] Marc Gunther, *In a Fast-Changing Industry, the Picture is Surprisingly Bright for the Networks*, Fortune, Apr. 1, 2002, at 106 ("The networks keep on evolving and surviving and even thriving."). Three of the four broadcast networks had revenue increases this year. ABC made $4.90 billion, a 12.5% increase; CBS made $3.59 billion, up 3%; Fox made $2.12 billion, up 13.5%. Only ABC had a decline in revenue. It made $2.89 billion in 2002, a 14.9% decline. *Biggest Still Holding Their Own*, Broadcasting & Cable, DEC. 2, 2002, at 24.

[294] Such action would give the remaining networks unprecedented market power in an already highly concentrated television market. *Amendment of Section 73.658(G) of the Commission's Rules—The Dual Network Rule, Notice of Proposed Rulemaking*, 15 FCC Rcd 11253, 11263 (2000) (showing that mergers among the major networks would have a harmful effect on the marketplace).

[295] Pamela McClintock, *FCC Plan Could Make Dual Cool: Ownership Task Force Created to Scrutinize Rules*, Writers Guild of America, East, Nov. 19, 2002, *available at* www.wgaeast.org/features/fcc-dual.html.

[296] *See supra* Part III.

[297] Howard Kurtz, *Seen No Cable, Hear No Cable . . .*, The Wash. Post, Aug. 12, 2002, at C1. In fact, CNN averaged only 1.06 million viewers during the height of the Washington-area sniper attacks, about double the amount of viewers that CNN normally averages. *Sniper Story Gives Networks Biggest Audiences of Year*, The Atlantic J. Const., Oct. 18, 2002.

would consolidate news departments without replacement by a comparable news organization in order to achieve economic efficiency.[298] Few other media outlets have the resources to gather and produce news covering national and international events. Broadcast television networks now have average annual news budgets of $300 million to $400 million each[299] and have reporters in many locations around the world. NBC, for instance, has a presence in 17 foreign sites despite reducing its overseas staff, and ABC has seven foreign news bureaus.[300] The two other outlets with appreciable national newsgathering resources—CNN and Fox News—are only available over cable systems and not as accessible as broadcast television news.[301]

Considering the role of national broadcast news in preserving a diversity of viewpoints, repeal of the dual network rule would result in a significant loss of viewpoint diversity in the provision of national and international news and would harm the public interest.

VI. THE RULES ARE CONSISTENT WITH THE FIRST AMENDMENT

Retention of the media ownership rules with the modifications suggested above would not only serve the pubic interest goals, but would be consistent with the First Amendment. The Commission recognizes that media ownership rules must be consistent with the First

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[298] Indeed, some have urged broadcast stations to scale down their news divisions to generate more earnings. Jim Rutenberg & Seth Schiesel, *Doubted as Business, Valued as Asset, Network News Will Be Hard to Displace*, N.Y. Times, March 18, 2002, at C1.

[299] Jim Rutenberg, *A Nation Challenged: The Coverage; Networks Move to Revive Foreign News*, N.Y. Times, Sep. 24, 2001, at C10. It is estimated that in the wake of the September 11 attacks, network broadcast news budgets may have to increase their budgets as much as 35% in the years to come. *Id.*

[300] Jim Rutenberg & Seth Schiesel, *Doubted as Business, Valued as Asset, Network News Will Be Hard to Displace*, N.Y. Times, March 18, 2002, at C1.

[301] *See supra* Part III.B.1. (discussing how cost of subscribing to cable prevents it from being as widely adopted as national broadcast television). Moreover, CNN has been in merger talks with Disney, which owns ABC News. The two news organizations considered combining their resources and staff into one operation that could result in a joint-news company. The deal would mean the end of an independent broadcast national news voice and could result in the elimination of ABC News altogether. *See* Tim Arango, *Parsons: Deal on Hold*, N.Y. Post, Dec. 11, 2002, at O30; Pamela McClintock, *Peacock Prez Dubious of CNN-ABC* Savings, Daily Variety, Nov. 21, 2002, at 2; Dusty Sanders, *Viewers Lose in News Merger*, Rocky Mtn. News, Nov. 20, 2002, at 2D.

Amendment rights of media companies and consumers and requests comment regarding the appropriate level of First Amendment scrutiny for its ownership rules.[302]

Broadcast media ownership limits preserve and promote the public's First Amendment right to a multiplicity of diverse and antagonistic sources of information without impinging on any First Amendment rights of affected media companies. Because the unique broadcast spectrum is a scarce resource held in trust for the benefit of the public, broadcast regulations need only be rationally related to a legitimate goal. Despite the proliferation of media outlets, spectrum scarcity continues to support application of minimal scrutiny for broadcast rules, even if such rules impose restrictions on non-broadcast firms. In fact, judicial precedent dictates that to the extent that broadcast media owners have any First Amendment interest in obtaining multiple media outlets, those rights must be balanced against the public's paramount First Amendment right to receive information from diverse sources.[303]

Because of the paramount First Amendment rights of the viewers and listeners, the Supreme Court has specifically rejected constitutional claims against the Commission's broadcast ownership restrictions. For instance, in *FCC v. Nat'l Citizens Comm. for Broadcasting ("NCCB")*, the Supreme Court held the First Amendment violation claims of newspapers and broadcasters were without merit as their claims "ignore[d] the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'"[304]

Use of ownership regulations to allocate a scarce public resource in a way that fosters the public's right to receive information from diverse sources does not unconstitutionally impinge the First Amendment rights of media companies. The Supreme Court recognized in *National*

302 NPRM at ¶¶ 20-22.
303 *See supra* Part I.A.
304 *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978) ("NCCB") (citing *Red Lion*, 395 U.S. at 388).

Broadcasting Co., Inc. v. United States, "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. Because it cannot be used by all, some who wish to use it must be denied."[305] Similarly, in *Red Lion,* the Court reasoned that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[306] Thus, because of the limited nature of the broadcast spectrum, any resulting denial of a license does not violate a license applicant's First Amendment rights,[307] particularly where the paramount rights of the public are involved.

Judicial precedent mandates the application of rational basis scrutiny to the Commission's broadcast ownership rules because those rules involve the allocation of a limited public resource, the broadcast spectrum.[308] In upholding the constitutionality of the newspaper-broadcast ownership rule 1978, the Supreme Court held that:

> far from seeking to limit the flow of information, the Commission has acted . . . "to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech." The regulations are a reasonable means of promoting the public interest in diversified mass communications; they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them.[309]

Since its decision in *NCCB*, the Supreme Court has on numerous occasions reaffirmed that relaxed scrutiny under the First Amendment remains appropriate for the broadcast media. In *Turner Broadcast Systems Inc. v. FCC ("Turner I")*, for example, the Supreme Court noted that "[a]lthough courts and commentators have criticized the scarcity rationale . . . we have declined

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[305] 319 U.S. 190, 226 (1943).
[306] *Red Lion*, 395 U.S. at 388; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994) ("*Turner I*").
[307] *NCCB*, 436 U.S. at 798-799.
[308] *NCCB,* 436 U.S. at 799-802 (applying rational basis review to the newspaper-broadcast ownership rule)**;** *Red Lion,* 395 U.S. at 388; *see also National Broad. Co. Inc. v. U.S.,* 319 U.S. 190, 226 (1943).
[309] *NCCB,* 319 U.S. at 801-02 (citation omitted).

to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here."[310] Even more recently, in *Reno v. American Civil Liberties Union*, the Supreme Court acknowledged that there are "special justifications for regulation of the broadcast media" when finding that unlike the broadcast spectrum, the Internet could not be considered scarce.[311]

In accord with Supreme Court jurisprudence, the D.C. Circuit has recently applied the rational basis standard to broadcast ownership rules in the *Sinclair* and *Fox Television* decisions.[312] Specifically rejecting any higher standard of review, the *Sinclair* court held that the local television ownership rule complies with the First Amendment and further noted the appropriateness of the rational basis standard to the content-neutral structural regulations.[313] Similarly, in *Fox Television,* the court explicitly reaffirmed the validity of the scarcity rational despite the advent of new media outlets and held that the Commission's decision to retain the national television ownership limit comported with the First Amendment.[314]

Thus, the heightened scrutiny applicable to other types of media does not apply to the analysis of regulations involving broadcast ownership interests.[315] Because of the unique characteristics of broadcasting, neither the intermediate scrutiny applied to cable ownership regulations in *Time Warner Entm't Co. v. FCC,*[316] nor the strict scrutiny standard applied to print media, apply to broadcast ownership regulations.

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[310] 512 U.S. 632, 638 (1994) (citation omitted).
[311] 521 U.S. 844, 868, 870 (1997). *See also Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 227-228 (1997) ("*Turner II"*) (Breyer, J. concurring); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 740-41 (1996) (plurality opinion); *Metro Broad. Co. v. FCC*, 497 U.S. 547, 566-67 (1990), *overruled in part by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *id.,* 497 U.S. at 615 (O'Connor, J., dissenting).
[312] *Sinclair*, 284 F.3d at 167-68; *Fox Television,* 280 F.3d at 1045-47.
[313] *Sinclair*, 284 F.3d at 167-68 (citations omitted).
[314] *Fox Television*, 280 F.3d at 1046-47 (citing *Turner I*, 512 U.S. at 637) (finding regulation requiring direct broadcast satellites to reserve channel capacity for non-commercial educational and informational programming constitutional). The court has also applied "a less rigorous standard of First Amendment scrutiny" and taken the public's First Amendment rights into account when reviewing broadcast regulations in *Time Warner Entm't Co., v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996), *reh'g en banc denied*, 105 F.3d 723 (D.C. Cir. 1997) (citing *Turner I*).
[315] *See* NPRM at ¶ 22.
[316] 240 F.3d 1126 (D.C. Cir.), *cert. denied*, 122 S.Ct. 644 (2001).

CONCLUSION

For the reasons discussed above, UCC *et al.* believe that except for the "UHF discount," the existing local and national broadcast ownership rules, continue to be necessary in the public interest and should be retained.

Respectfully submitted,

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